(24,557)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 813.

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA *EX REL.* WILLIAM J. FRIZZELL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

a Supreme Court of the District of Columbia.

Law. No. 56157.

UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL
vs.
OLIVER P. NEWMAN.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it Remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to-wit:

1 *Exceptions and Objections to Filing of Petition, &c.*

Filed September 2, 1913.

In the Supreme Court of the District of Columbia.

Law. No. 56157.

UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL
vs.
OLIVER P. NEWMAN.

Respondent, Oliver P. Newman, Commissioner of the District of Columbia, hereby excepts and objects to the granting of permission to file the petition in the above entitled action and to the issuance of a writ of quo warranto against him thereunder, and for cause says:

1. The said relator is not entitled to bring this suit merely because he is a resident and tax-payer in the District of Columbia, such facts not giving him sufficient interest in the subject matter to permit it,

and that even if he were so entitled his interest in the office is too impalpable to be the subject of legal consideration, he paying no taxes on personal property in the District of Columbia and but the sum of $179.00 on real estate out of a total of $5,000,000 annually collected from the real estate tax-payers of the District of Columbia.

2. That this proposed respondent was duly appointed Commissioner of the District of Columbia by the President of the United States by and with the advice and consent of the Senate of the United States; that his qualifications for his office were fixed by law, examined into and determined by the said President and
2 Senate upon his appointment, and cannot be reviewed by any judicial authority; that the proposed relator, with his attorney, appeared before the Committee of the Senate having the nomination of this proposed respondent in charge and objected to the confirmation of such nomination, but that such objections were unanimously overruled by the Senate, the only appropriate tribunal to pass thereon, and cannot again be reviewed.

3. That, as stated, this proposed respondent was found duly qualified by the President and the Senate, and in fact he was and is so qualified, but that the evidence in support of his qualifications is only partially set out in the various exhibits attached to the petition herein, which petition in addition contains sundry material errors, as this proposed respondent is informed and believes.

4. That the appointment of said proposed respondent is for the term of three years, but that during such period of three years he is subject to removal by the President at any time and that a writ of quo warranto will not lie in any instance where the appointee is at all times subject to removal by the appointing power.

5. That no public interest whatsoever will be subserved by the granting of the permission and writ prayed for by the petitioner, but that on the contrary the exercise of the public functions entrusted to this proposed respondent will be hampered and interfered with; that, by way of illustration, this proposed respondent says that at the present time in the division of duties among the several Commissioners he is given charge, among other Departments, of the Municipal Government, of the offices of the Assessor and Assessments, Auditor, Tax-collector, Board of Charities,
3 Washington Asylum and Jail, Work House, Disbursing Officer, Legal Department, Superintendent of Insurance, Public Schools, and others; that during his period of encumbency in office he has sought to familiarize himself with the workings of these several offices, as well as the other Departments of the District Government, and to a large extent has done so; that if he is removed from office the interests of the District of Columbia will be prejudiced by reason of the fact that a considerable interim of time must pass before the President could select his successor and such successor could be confirmed by the Senate, during which time his associates would be compelled as best they could, and without having given preliminary study, to perform the duties now devolving upon him.

That furthermore the three Commissioners of the District of Columbia at the present time are engaged in the preparation of esti-

mates for the disbursement of the funds of the District for the fiscal year ending June 30, 1915; that these estimates involve the apportionment, control and expenditure of about fourteen millions of dollars and thousands of items of varying size; that this estimate has to be completed by October 15, 1913, and that to do this work in addition to the current work devolving upon them will require the continuous and uninterrupted attention of this proposed respondent and his two associates, and that a judgment of ouster against him would, therefore, result in crippling the directing head and management of the affairs of the District of Columbia in respect to the matters stated.

That there are now pending before the Board of Commis-
4 sioners of the District of Columbia, for execution, contracts involving the expenditures of hundreds of thousands of dollars; that this petitioner, with his associates, has been familiarizing himself with the conditions and requirements surrounding said contracts, with a view to executing as speedily as possible such as should be executed and taking such other steps with relation thereto as the interests of the District require; that his ouster at this time would throw additional and unexpected burdens upon his associates and delay necessarily the signing of contracts for improvements, material, constructions and supplies urgently needed in the District of Columbia and would result in inconveniencing and injuring in a large measure great bodies of inhabitants of said District.

That as a member of the Board of Commissioners of the District of Columbia this proposed respondent is also a member of the Public Utilities Commission consisting of the other members of the Board and himself; that there are now pending before said Public Utilities Commission, undetermined but receiving the active consideration of each member, at least three controversies affecting the interests of practically every citizen and resident of the District of Columbia, and that his ouster at this time would delay and undoubtedly postpone until his successor could be appointed and qualified, the determination of each of these three cases, materially affecting the interests of the public of the District of Columbia and of the Public Utilities corporations concerned therein, all of whom are entitled to a reasonably speedy determination of the issues.

6. That the Attorney General of the United States and
5 the United States Attorney for the District of Columbia have both refused to file the petition in quo warranto asked for by the proposed relator and that their action was based upon the fact that no public interest would be subserved in the presentation thereof and that such action on their part should be conclusive upon the discretion of the Court in the premises and result in a refusal to permit the filing of the petition herein, no facts having been offered by the proposed petition in opposition to the said conclusion of the Attorney General and of the said United States Attorney.

7. That this proposed respondent verily believes that the said petition is not filed in good faith, but at the instigation of persons unknown to this proposed respondent, whose animus should be the subject of inquiry and whose names and contributions should be

fully disclosed to this Court through diligent inquiry of the relator and others, to the end that the process of the Court may not be abused to serve private animosities or interests.

8. That the whole procedure contemplated herein is an attempt to invoke an infringement by the judicial authorities upon the powers, responsibilities and duties of the Executive and Legislative branch of the Government, which is especially charged with the determination of the qualifications of appointees to office and whose conclusions are final as to such matters so committed to them.

OLIVER P. NEWMAN.

RALSTON & RICHARDSON, *Attorneys.*

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing and annexed objections and exceptions by me subscribed and know the contents thereof, and that the statements of fact therein made, as upon personal knowledge, are true, and those made as upon information and belief I believe to be true.

OLIVER P. NEWMAN.

Subscribed and sworn to before me this 2nd day of September A. D. 1913.

[SEAL.] MARY W. GOODWIN,
Notary Public, D. C.

Petition for Quo Warranto.

Filed September 2, 1913.

* * * * * * *

The Petition of William J. Frizzell, respectfully shows:

1. That he is a citizen of the United States and a resident of the District of Columbia and a tax payer therein.

2. That by an act of the Congress of the United States approved June 11, 1878, there was provided a permanent form of government for the District of Columbia; that among other things it was by said Act declared that the District of Columbia should remain and continue a municipal corporation and that the President of the United States, by and with the advice and consent of the
7 Senate, should appoint two persons who with an officer of the Corps of Engineers of the United States Army, whose lineal rank should be above that of captain, should be Commissioners of the District of Columbia, and that the official term of said Commissioners thus to be appointed from civil life should be three years and until their successors should be appointed and qualified.

And it was by said act further provided as follows:

"The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else."

Your petitioner further gives the Court to be informed that on, to wit, the 26th day of June 1913, the President of the United States nominated to the Senate one Oliver P. Newman to be one of the Commissioners of the District of Columbia appointed from civil life, and the nomination of the said Oliver P. Newman to the said office was thereafter by the Senate confirmed; and thereafter, to wit, on the 19th day of July, 1913, the said Oliver P. Newman took the prescribed oath and entered upon the said office and has ever since and yet holds the same. But so it is, as your petitioner shows, that the said Oliver P. Newman was not qualified in law to receive such an appointment; that he has unlawfully assumed and usurped the said office and is not lawfully entitled to the same or to exercise the functions and enjoy the emoluments thereof because, as your petitioner avers; First:—at the time of his appointment to the said office he, the said Oliver P. Newman, had not been an actual resident of the District of Columbia for three years
8 next before his appointment to said office, and, Second:—He, the said Oliver P. Newman, had during the three years next before his appointment to said office claimed residence elsewhere than in the District of Columbia, to wit, at Chicago, Illinois, and at Princeton, New Jersey, all of which will appear at large by the affidavits and the statement of Oliver P. Newman herewith submitted and prayed to be taken as part hereof.

Your petitioner is desirous that proper proceedings by quo warranto be taken to determine the right of the said Oliver P. Newman to the said office of Commissioner of the District of Columbia and to this end he has in turn applied to the Attorney General and to the Attorney of the United States for the District of Columbia and has requested them to take such proceedings, but so it is that each of the said officials has refused to institute the same. Copies of your petitioner's letters to the said Attorney General and the United States Attorney for the District of Columbia, and of their answers thereto are here attached and prayed to be read as part hereof.

The premises considered, *and* your petitioner hereby tendering himself ready to file a bond with sufficient surety in such penalty as the Court may prescribe and conditioned as provided by law, prays the leave of the Court to have the said writ of quo warranto, issue in the name of the United States upon the relation of your petitioner, against the said Oliver P. Newman, requiring him to show by what warrant he holds or exercises the said office of Commissioner of the District of Columbia and to answer the averments of this petition, and that thereafter such proceedings shall be
9 had as are prescribed by law and if it shall be found that the said Oliver P. Newman has usurped, intruded into or unlawfully holds the said office that he shall be ousted and excluded therefrom.

And your petitioner will ever pray, etc.

WILLIAM J. FRIZZELL, *Petitioner.*

WM. J. NEALE,
J. W. BAILEY,
A. A. BIRNEY,
Counsel for Petitioner.

CITY OF WASHINGTON,
District of Columbia, ss:

I, William J. Frizzell, being first duly sworn do on oath depose and say that I have read the foregoing and annexed petition, by me subscribed, and know the contents thereof; that those matters stated therein as true are true in fact and that those matters stated upon information and belief, I verily believe to be true.

WILLIAM J. FRIZZELL.

Subscribed and sworn to before me, this 26" day of August 1913.
[SEAL.] JAMES M. WOOD,
Notary Public, D. of C.

10 CITY OF WASHINGTON,
District of Columbia, ss:

I, Geo. C. Montgomery, being first duly sworn, on oath do depose and say that as a representative of the Home Rule Committee of the District of Columbia, I visited the City of New York on July 7th, 1913 and examined the register of the Hotel Judson, locate- at number 53 Washington Square, South, New York; that upon said examination and inspection I found that Oliver P. Newman was registered at the said Hotel on November 12th, 1912, and that upon said register he gave his residence as Chicago, Illinois, I was advised by the manager of the said Hotel that the said Newman had stopped at the said hotel on many occasions and each time gave his residence as Chicago, Illinois, but the manager declined to show his register of any other dates than that above mentioned. And he further said he did not know whether he had done right in giving me the above information or not. I returned to the said Hotel on July 8th, 1913, and the manager again refused to give any further information in regard to Mr. Newman. On Tuesday July 8th, 1913, I called at the office of Cohan and Harris 1482 Broadway, New York and was informed by Mr. James Dunn, who is connected with the said firm, that Oliver P. Newman was engaged by the said firm for the purpose of dramatizing a story known as "The Fortunes of the Son," and that he was actively engaged in said work from the 11th day of October, 1912 to the 5th day of November, 1912, doing said work at the office of Cohan and Harris, 1482 Broadway, New York.

GEORGE C. MONTGOMERY.

11 Subscribed and sworn to before me, this 10th day of July, 1913.
[SEAL.] WM. J. NEALE,
Notary Public, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

Charles C. Lancaster, Attorney at Law, rooms 509 & 510 Corcoran Building, being first duly sworn, on oath deposes and says:

That he secured from Harry L. Rust, Real Estate Broker, No. 1400 H Street, N. W., agent for the lease of apartments in what is known as "Florence Court" a local apartment house, a copy of the lease entered into by and between Harry L. Rust, of the District of Columbia, party of the first part, and O. P. Newman (whose address is not given) party of the second part, for the lease of apartment No. 404 Florence Court West Apartment House, "Furnished as per list hereto attached" a true copy of which is hereto attached, marked exhibit "A". That this apartment is owned by Commander William Kilborn, U. S. N. and is leased for the summer.

CHARLES C. LANCASTER,
Attorney and Counsellor at Law.

Rooms 509 & 510 Corcoran Bldg., Washington, D. C.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 20th day of August, A. D. 1913.

12 [SEAL.] JAMES M. WOOD,
Notary Public, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

Charles C. Lancaster, of the City and District aforesaid, being first duly sworn, on oath deposes and says:

That on Wednesday, July 9th, 1913 he examined the hotel register of the Hotel Shoreham, 15th and H Streets, N. W., for the month of March, 1913 and found that said register shows that Oliver P. Newman was a guest at said hotel from March 3, to March 5, 1913, and that in registering he gave his residence as "Princeton, N. J." and the aforesaid register of the Hotel Shoreham shows as follows:

"Oliver P. Newman, Princeton, N. J."

Further deponent sayeth not.

CHARLES C. LANCASTER.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 26th day of August, 1913.

[SEAL.] JAMES M. WOOD,
Notary Public, D. C.

13 DISTRICT OF COLUMBIA, *ss:*

We, James N. England and Carleton W. Stanton, being first duly sworn, depose and say: that on July 4th, 1913 during the course of a conversation with a former employee of Julius Garfinkle and Company we were informed that Oliver P. Newman, who has been nominated by the President of the United States for Commissioner of the District of Columbia, did some time in the year 1910 open a credit account with the Julius Garfinkle — ; that the said Newman then resided at the Westminster Apartment House in the District of Columbia; that later on it became necessary to communicate with the said Newman and that letters addressed to the Westminster

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were returned by the postal authorities undelivered. Your opponents further say that not having the right to compel parties to testify they have been unable to further verify this report.

JAMES N. ENGLAND.
CARLETON W. STANTON,

Subscribed and sworn to before me, this 26th day of August A. D. 1913.

[SEAL.] PHIL W. CHEW,
Notary Public D. of C.

14 CITY OF WASHINGTON,
District of Columbia, ss:

I, James N. England, attorney at law, 612 F Street, being first duly sworn, on oath do depose and say that on the 8th day of July 1913, I called at the Municipal Court of the District of Columbia for the purpose of examining the Court Records in the case of William Etschman, Plaintiff vs. Oliver P. Newman, Defendant, No. 12,195. Among the papers in the jacket was a copy of the original summons in this case and on this copy was written in pencil with a line drawn through it (but not marked out so that it could not be read) the words left Washington to go into business in Chicago with the initials C. S. E. I found that the initials were those of a deputy marshal.

JAMES N. ENGLAND.

Subscribed and sworn to before me, this 26th day of August, 1913.

[SEAL.] PHIL W. CHEW,
Notary Public, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

I, William J. Frizzell, of lawful age, of the city and District aforesaid, on oath depose and say:

That I am familiar with the real estate and personal tax ledgers of the District of Columbia and that I have examined the
15 same, beginning with July 1, 1908, and ending June 30, 1913 and find that the name of Oliver P. Newman does not appear anywhere on said tax ledgers during the period aforesaid.

WILLIAM J. FRIZZELL.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 26th day of August, A. D. 1913.

[SEAL.] JAMES M. WOOD,
Notary Public, D. C.

CITY OF WASHINGTON,
District of Columbia, ss:

William J. Frizzell of the city and District aforesaid being first duly sworn deposes and says:

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That he has examined the Chicago Illinois City Directory for the year 1912 and found on page 1033 thereof the following entry: "Newman, Oliver P. reporter, 4th fl. 102 N 5th Av., H 1018 Lawrence Av."

That in said directories for 1910 and 1911 the name of Oliver P. Newman does not appear.

That he has also examined the city directories of St. Joseph Mo., for 1908 and finds therein the following entry: "Newman, Oliver P. Editor The Star, b 415 n 4th"

That he has also examined the city directory for 1909 and finds the following entry: "Newman, Oliver P. editor The Star.
16 1401 Edmond" and in said directory for 1910 he found the following entry: "Newman Oliver P. moved to Lincoln, Neb."

That he has also found in the city directory of Lincoln, Neb. for 1910 the following entry: "Newman, Oliver P. mngr Lincoln Daily Star b 1630 G"

And further deponent sayeth not.

WILLIAM J. FRIZZELL.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 26th day of August, A. D. 1913.

[SEAL.] JAMES M. WOOD,
Notary Public, D. of C.

Statement of Mr. Oliver P. Newman.

Mr. NEWMAN: In reply to your invitation, to address you, Mr. Chairman and members of the committee, I will merely say that I came here, as has been pointed out, in March, 1910. I want to say to the committee that at that time my intention was to become a resident of the District of Columbia. The dates cited by Mr. Mitchell as my absences are approximately correct. These absences were because of the character of the work in which I was engaged and were taken with the intention determined in my own mind that they were temporary absences; that Washington was my residence
and that as soon as the character of that work changed, as
17 soon as that particular job was over, I would be back here in the city of Washington, which I consider my residence.

I would like to just call to your attention one circumstance which I think substantially indicates rather than my bare word that that was my intention. It seems to me that the best evidence of my intention to return was the fact that I did come back and the fact that I moved my family back here months before I came back myself.

Senator WORKS: Mr. Newman, did you when you went away sever your connection with the Post or did you still maintain it?

Mr. NEWMAN: I was not on the Post, Senator. I was on the Times.

Senator WORKS: Did you sever your connection with the Times when you went away?

OPY

Mr. NEWMAN: Yes, sir.

As to the question of my having registered or having been registered at various places from other cities, I think it is very apparent that a man in my position would register for business reasons not necessarily from the city of Washington. For instance, at the time that I was working out of Chicago I naturally registered from Chicago because that was the city which was the central point around which I was radiating. It would be impossible to establish, on the basis of Mr. Mitchell's argument, that I was a resident of Chicago because during the year approximately that my family was there I myself was not in Chicago two consecutive months. I was traveling in the pursuit of the newspaper work. My understanding, my arrangement with the general manager of the Scripps papers, who employed me for that work, was that it was a temporary
18 arrangement and that I would be back in Washington as soon as the presidential campaign was over. I think that is all that I care to say. I should be very glad to answer any questions the committee desires to ask.

Senator JONES: When you went away from Washington did you have an understanding with the Times or anyone here that you would return in their employ?

Mr. NEWMAN: No, sir. You see this Scripps organization has no newspaper in Washington. They are middle western and far western newspapers.

Senator WORKS: Can you point to anything you did while in Washington to indicate your personal residence here other than the fact that you were living here? What did you do in the way of paying taxes, in the way of registration, or anything that would indicate your citizenship?

Mr. NEWMAN: I paid no taxes, or anything——

Senator WORKS: My question was general as to whether you could point to anything that would indicate your personal residence.

Mr. NEWMAN: Of course I was a member of the chamber of commerce and a member of the Monday Evening Club—secretary of the Monday Evening Club. I was on several committees of the chamber of commerce. I was more or less active as a citizen.

Senator WORKS: Did you sever your connection with those organizations?

Mr. NEWMAN: I did not—not with the Monday Evening Club, but I allowed my chamber of commerce membership to lapse.

Senator WORKS: While you were in Chicago?

19 Mr. NEWMAN: Yes, sir, while I was away.

The CHAIRMAN: Where was the central office of the business you represented?

Mr. NEWMAN: In Chicago. That is, part of the time, Senator, we had an office in Chicago and we had an office in New York. Part of the time I was reporting to the Chicago office and part of the time to the New York office.

Senator POMERENE: Have you during these three years voted anywhere?

Mr. NEWMAN: No, sir; I have not. I have not attempted to register or attempted to vote.

Senator WORKS: Mr. Newman, did you resign your secretaryship in the Monday Evening Club?

Mr. NEWMAN: Yes, sir.

Senator WORKS: Give your reasons for that.

Mr. NEWMAN: That I was going to take up this other work and be absent from the city and I knew that I would be away from the city for a number of months.

Senator JAMES: What were you doing while you were in Chicago?

Mr. NEWMAN: Principally the presidential campaign of all the parties.

Senator JAMES: Did you immediately after that campaign was over come back to Washington?

Mr. NEWMAN: No, I did not. As soon as the conventions were over I went to Seagirt.

Senator JAMES: I mean after the President came away from Seagirt.

Mr. NEWMAN: In November? No, sir; I stayed on until
20 inauguration with President Wilson.

Senator JAMES: You were there with the rest of the newspaper correspondents, were you not?

Mr. NEWMAN: Yes, sir. There were never less than eight or nine or a dozen or fifteen.

Senator JONES: And all that time your family was in Chicago?

Mr. NEWMAN: No, sir. That is the point I made a moment ago. Perhaps I did not bring it out sufficiently. I brought my family back to Washington in November.

Mr. LANCASTER: Where did you stop, Mr. Newman?

Mr. NEWMAN: I will answer any question the committee desires to ask.

Senator JAMES: When did you go to Seagirt?

Mr. NEWMAN: July 3rd, the day after the nomination.

Senator JONES: Did you ever establish a voting residence anywhere?

Mr. NEWMAN: Since March, 1910?

Senator JONES: No; at any time.

Mr. NEWMAN: Yes, sir.

Senator JONES: Where?

Mr. NEWMAN: Years ago in my old home in Des Moines.

Senator JONES: You had a voting residence in Des Moines?

Mr. NEWMAN: Yes, sir; and then later in St. Joseph, Missouri. I voted in 1908 in St. Joseph.

The CHAIRMAN: And you have voted nowhere since 1908?

21 Mr. NEWMAN: I do not recall whether I voted in Lincoln in 1909 or not. I may have done so. There was a municipal election out there and I may have voted, but if so that was the last time. I have not voted since before I came to Washington in March, 1910.

Senator JAMES: So when you went out to Chicago it was only temporarily?

Mr. NEWMAN: Yes, sir.

Senator JONES: While you were at Seagirt that was only temporary?

Mr. NEWMAN: Yes, sir.

Senator JAMES: You intended to return here, you did return, and you have been here ever since?

Mr. NEWMAN: Yes, sir.

Senator POMERENE: And all that time you regarded Washington as the city of your residence?

Mr. NEWMAN: Yes, sir.

Senator WORKS: What have been your newspaper connections since you came back?

Mr. NEWMAN: The same—the Scripps.

Senator WORKS: Is the Times one of their newspapers?

Mr. NEWMAN: No, sir.

Senator WORKS: Have they any newspaper here?

Mr. NEWMAN: No, sir; they have no newspaper in Washington.

Senator WORKS: You are only a correspondent of some outside newspapers?

Mr. NEWMAN: Yes, sir.

Senator JAMES: Did you ever give your name to any census taker in Chicago as a resident of Chicago?

22

Mr. NEWMAN: No, sir.

The CHAIRMAN: Were you aware of the fact that you were registered there in the city directory?

Mr. NEWMAN: No, sir. I was not until Mr. Mitchell stated it here.

Senator WORKS: Mr. Newman, you stated that when you went to Chicago you went under a temporary arrangement with the Scripps newspapers?

Mr. NEWMAN: Yes, sir.

Senator WORKS: It was understood that it would terminate with the campaign, was it not?

Mr. NEWMAN: There was no specific time of termination. I went for the primary purpose—as you all know in July, 1911, the lines were drawn—and it was for the purpose of writing about the presidential campaign and distributing it among our newspapers. Mr. Scripps owns thirty papers. I was to work from Chicago as a base, doing more or less traveling to obtain political information.

Senator WORKS: I asked that question because you stated in the beginning I believe that your engagement with them was temporary when you went to Chicago.

Mr. NEWMAN: I did not mean tentporary as to employment with them—temporary as to residence in Chicago.

Senator WORKS: You are working for them under the same contract now? Did you make a new contract?

Mr. NEWMAN: No, sir.

Senator JONES: Did you have an understanding with them when you left Chicago that you were to come back to Washington in their employ?

23 Mr. NEWMAN: Yes, sir.

Senator JAMES: You merely went to Chicago because it was the most convenient place to gather this news?

Mr. NEWMAN: That is it. I went there because it was geographically the most convenient place.

Senator JAMES: You went to Seagirt because the democratic nominee was there?

Mr. NEWMAN: Yes, sir.

Senator WORKS: Mr. Newman, the statement has been made here that when you made your contract of leasing you declined to give your residence. I think it may be well for you to explain that.

Mr. NEWMAN: I think that is incorrect, Senator. I have no recollection of having made any such declination.

Senator JONES: Did you have any written agreement or understanding with the McRae people?

Mr. NEWMAN: No, sir.

Senator JONES: It was all verbal?

Mr. NEWMAN: Those things usually are you know in newspaper arrangements.

Senator JONES: As I understand you, you had an express understanding with the manager, with the Scripps-McRae people, when you left here in Washington to go to Chicago to take charge of the work there, that when that was finished you were to come back to Washington City to take charge of their work here?

Mr. NEWMAN: Yes, sir—not in charge.

Senator JONES: But in connection with their work here?

Mr. NEWMAN: Yes, sir.

24

August 7, 1913.

The Attorney General.

SIR: On or about the 26th day of June 1913, the President of the United States appointed Mr. Oliver P. Newman as a Commissioner of the District of Columbia. Later Mr. Newman's nomination was confirmed by the Senate, he took the oath of office and assumed the duties thereof and he is now holding and exercising the powers of the said office.

I am a citizen of the District of Columbia and a resident and tax payer thereof and interested in the observance of the law in respect of such an appointment. I am advised that at the time of his appointment Mr. Newman had not been an actual resident of the District of Columbia for three years next before his appointment and that he had during that period claimed residence elsewhere. For these reasons he was not eligible for appointment under the provisions of the Act of June 11, 1878, (20 Stats. 102), and his assumption of the duties of the office is a usurpation. I herewith submit for your consideration copies of affidavits in my possession and which I will submit to you should you desire the originals, which I believe wholly substantiate the above charges and have the honor to respectfully request that you will institute, either in your name or upon my relation, proceedings in quo warranto against Mr. Oliver P. Newman to determine his right to the office referred to. I am

prepared to give bond with sufficient surety for the payment of the proceeding.

Very respectfully,

WILLIAM J. FRIZZELL,
Address. 42 *V St. N. W.*

25 Office of the Attorney General.

(Department of Justice.)

WASHINGTON, D. C., August 21, 1913.

William J. Frizzell, Esq., 45 V Street, N. W., Washington, D. C.

DEAR SIR: Permit me to acknowledge your letter of August 19th, referring to an earlier one, also received, in which you ask me to institute proceedings in the Supreme Court of the District to test the eligibility of Oliver P. Newman to hold the office of a civil commissioner of the District of Columbia.

I respectfully decline to comply with your request.

Very truly yours,

J. C. McREYNOLDS,
Attorney General.

August 22, 1913.

The United States Attorney for the District of Columbia.

SIR: On or about the 26th day of June 1913, the President of the United States appointed Mr. Oliver P. Newman as a Commissioner of the District of Columbia. Later Mr. Newman's nomination was confirmed by the Senate, he took the oath of office and assumed the duties thereof and he is now holding and exercising
26 the powers of the said office.

I am a citizen of the District of Columbia and a resident and tax payer thereof and interested in the observance of the law in respect to such an appointment. I am advised that at the time of his appointment Mr. Newman had not been an actual resident of the District of Columbia for three years next before his appointment and that he had during that period claimed residence elsewhere. For these reasons he was not eligible for appointment under the provisions of the Act of June 11, 1878, (20 Stats. 102), and his assumption of the duties of the office is a usurpation. I herewith submit for your consideration copies of affidavits in my possession and which I will submit to you should you desire the originals, which I believe wholly substantiate the above charges and have the honor to respectfully request that you will institute, either in your name or upon my relation, proceedings in quo warranto against Mr. Oliver P. Newman to determine his right to the office referred to. In compliance with the provisions of the Code of Laws for the District of Columbia, I have requested the Attorney General of the United States to institute these proceedings, and by a letter under date of August 21st 1913 he declined to comply with

my request. I am prepared to give bond with sufficient surety for the payment of the proceeding.

Very respectfully,

WILLIAM J. FRIZZELL.

Address. 42 V St. NW.

27 J. M. P.–B. J. L.

Office of the United States Attorney, District of Columbia.

WASHINGTON, D. C., *August* 23, 1913.

Mr. William J. Frizzell, 42 V Street, N. W., Washington, D. C.

DEAR SIR: I am in receipt of your letter of the 22d instant, addressed to the United States Attorney for this District, supported by copies of certain affidavits, requesting the District Attorney to institute in his name or upon your relation, proceedings in quo warranto against Mr. Oliver P. Newman, to test his eligibility to hold the office of a civil Commissioner of the District of Columbia.

Mr. Wilson, the District Attorney, is spending his vacation in Europe and will not return for a month. Acting in his stead, I respectfully decline to comply with your request.

Respectfully,

JAMES M. PROCTOR,
Assistant United States Attorney in Charge.

28 *Order Granting Leave to File Petition, &c.*

Filed September 2, 1913.

* * * * * * *

Upon consideration of the petition of William J. Frizzell, praying leave of this Court to file a petition for a writ of Quo Warranto for the purposes set out in said petition and against Oliver P. Newman and upon consideration thereof, it is this 2d day of September 1913 ordered that said petitioner have leave to file said petition and proceed thereunder, as prayed in said first mentioned petition upon giving bond to be approved by the Clerk for the costs in sum of three hundred dollars ($300.00).

By the Court,

WRIGHT, *Justice.*

To the granting of the foregoing order the said Oliver P. Newman, by his attorneys Ralston & Richardson in open court excepts and objects for the reasons at this time presented.

Memorandum.

September 2, 1913.—Bond $300 approved and filed.

29 *Order for Issuance of Quo Warranto, &c.*

Filed September 2, 1913.

* * * * * * *

Upon consideration of the petition filed this day by the relator William J. Frizzell, for a writ of Quo Warranto, it is this 2d day of September 1913 ordered that a writ of Quo Warranto issue herein addressed to the respondent Oliver P. Newman, and returnable on the twentieth day, exclusive of Sundays and legal holidays occurring after the day of the service thereof, requiring the said respondent Oliver P. Newman to show cause by what warrant he claims to hold and exercise the office of Commissioner of the District of Columbia, and why the relief prayed against him should not be granted.

By the Court,

WRIGHT, *Justice.*

To the granting of the foregoing order the said Oliver P. Newman by Ralston & Richardson, his attorneys, in open court excepts and objects for the reasons at this time presented.

30 *Writ of Quo Warranto.*

Issued September 2, 1913.

* * * * * * *

The President of the United States: To the Respondent Oliver P. Newman, Greeting:

Whereas William J. Frizzle has filed in our Court on behalf of the United States a petition for a writ of Quo Warranto, a copy of which petition is hereto annexed:

Therefore you are commanded to appear at this Court on the twentieth day exclusive of Sundays and legal holidays occurring after the day of the service hereof to then and there make answer to the said United States on said relation touching and concerning the premises, and to show by what warrant you claim to use, exercise and enjoy the office of Commissioner of the District of Columbia in said petition mentioned, and to show if you know or have anything to say for yourself why you should not be ousted from said office, and why the relief prayed in said petition should not be granted. And further to do and abide by the order, judgment or decree of the said Supreme Court of the District of Columbia in the premises upon what shall then and there be made to appear.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the said Supreme Court of the District of Columbia on this 2d day of September 1913.

[SEAL.] JOHN R. YOUNG, *Clerk.*

31 *Marshal's Return.*

Served copy of within writ and copy of petition on Oliver P. Newman personally.
Sept. 2, 1913.

AULICK PALMER, *Marshal.*
C. R. S.

Memorandum.

September 24, 1913.—Appearance of Ralston and Richardson, G. W. Hott and John W. Davis, for defendant, filed.

Motion to Quash.

Filed September 24, 1913.

* * * * * * *

Now comes respondent, Oliver P. Newman, Commissioner of the District of Columbia, by his attorneys, and moved this honorable court to quash the writ of quo warranto heretofore issued herein, as having been improvidently issued, and for cause says—

1. The relator does not show that he has such an interest in the issuance of the writ that he is entitled to invoke the discretion of the court in obtaining the same, the Attorney General or United States Attorney for the District of Columbia alone, if any
32 one, being entitled to bring the action.

2. That this respondent having been appointed, as shown by the petition, by the President of the United States and confirmed by the Senate, their conclusions are final and no power of review of his qualifications resides in any court, and the exercise of such power would be an infringement upon the powers of a co-ordinate branch of the government.

3. That the appointment of this respondent is for the term of three years, but that during such period of three years he is subject to removal by the President at any time, and that a writ of quo warranto will not lie in any instance where the appointee is at all times subject to removal by the appointing power.

4. That no public interest whatsoever was or could be subserved by the issuance of a writ of quo warranto herein.

5. That the Attorney General of the United States having refused to file the petition of quo warranto asked for by the relator and his action being base upon the manifest fact that no public interest would be subserved in the presentation thereof, such determination on his part is conclusive upon the discretion of the court in the issuance of a writ of quo warranto, no new facts having been offered by the petitioner in opposition to such conclusions.

6. That the relator has not shown any interest in the office itself as contemplated by the statute and has, therefore, no interest upon which could be based any application for leave to file the writ herein.

7. That no inquiry was made by the court as to the motives
33 of the relator, as should have been had to determine whether the discretion of the court should be exercised to permit the filing of the petition.

8. That it does not appear that the United States District Attorney for the District of Columbia has refused to institute this proceeding on the request of the relator and said relator has, therefore, no right to institute the said proceeding on his own behalf.

RALSTON & RICHARDSON,
G. W. HOTT,
JNO. W. DAVIS,
Respondent's Attorneys.

Demurrer to Petition.

Filed September 24, 1913.

* * * * * * *

Now comes the respondent, by his attorneys, and, without waiving the motion to quash herein, says that the petition is bad in substance.

RALSTON & RICHARDSON.
G. W. HOTT.
JNO. W. DAVIS.

Points to be Argued.

Among the points to be argued under the above demurrer are the following:

34 1. The right to appoint Commissioners for the District of Columbia and to determine the qualifications of such appointees rests exclusively in the President and Senate of the United States without any power of judicial review, and any judicial review would be an infringement upon the powers of a co-ordinate branch of the government.

2. If such power of review existed the relator has no interest in the office itself and is, therefore, not an interested person within the meaning of the statute, the Attorney General or the United States Attorney for the District of Columbia alone, if any one, being entitled to bring the action.

3. The relator is not shown to have such an interest as a tax payer as will justify an interference with the orderly operations of government.

4. That the respondent being appointed for the term of three years and during such period being subject to removal by the President at any time, he may not be ousted through a quo warranto proceeding.

5. That it does not appear from the petition that any public interest whatsoever will be subserved by its prosecution and the writ cannot be used for private purposes.

6. That it does not appear that the United States District Attorney for the District of Columbia has refused to institute this proceeding on the request of the relator and said relator, has, therefore, no right to institute the said proceeding on his own behalf.

7. Other matters to be presented upon the hearing.

RALSTON & RICHARDSON,
G. W. HOTT,
JNO. W. DAVIS,
Respondent's Attorneys.

35 Supreme Court of the District of Columbia.

TUESDAY, October 21st, 1913.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Upon consideration of the motion filed herein to quash the Writ of Quo Warranto issued and of the demurrer filed herein to the petition, heretofore argued and submitted to the Court by attorneys of record for the respective parties, it is this 21st day of October 1913; ordered that said motion to quash be, and the same is hereby granted, and said writ is hereby quashed. Further it is ordered that said demurrer be, and the same is hereby sustained.

Wherefore, the petitioner by his attorneys, now in open court, electing to stand upon said petition, it is considered that the same be and is hereby dismissed, that petitioner take nothing by this action, that the respondent go hence without day, be for nothing held and recover of petitioner his costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the petitioner by his attorneys in open court, notes an appeal to the Court of Appeals, whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars.

36 *Opinion of Mr. Justice Anderson.*

Filed October 22, 1913.

* * * * * * *

The statute under which this proceeding was instituted, viz., Chap. 51 of the Code of Laws for the District of Columbia, provides for the writ of quo warranto:

"Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation."

By this proceeding, the relator William J. Frizzell seeks by such writ to require the respondent Oliver P. Newman to show by what warrant he holds or exercises the office of Commissioner of the District of Columbia, and that, if it shall be found that the respond-

ent has usurped, intruded into or unlawfully holds said office, that he be ousted and excluded therefrom.

In this jurisdiction, the right of an individual citizen to institute quo warranto proceedings for the purpose stated is not a matter of strict legal right. He must bring himself clearly within the provisions of the statute before he can invoke its aid. The statute in question (§ 1540 D. C. Code) reads as follows:

"SEC. 1540. If Attorney-General and District Attorney Refuse.—If the Attorney-General and district attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs."

It will be observed from a reading of this section of the
37 statute (in connection with the preceding section 1539) that three things must concur before the petitioner is entitled to institute and maintain his suit, viz.:

1st. The Attorney General of the United States and the United States District Attorney must have refused his request to institute such proceedings.

2nd. The relator must be an "interested person" within the meaning of the statute.

3rd. He must, as a preliminary step, apply to the Court by verified petition for leave to have such writ issued, and obtain such leave.

The relator having presented his verified petition to the Court, in which it is averred, in substance, that he had theretofore duly requested the Attorney General and the District Attorney to institute quo warranto proceedings against the respondent, and that such request was refused, leave to issue such writ was granted by the Court and duly issued in the name of the United States on the relation of the relator, William J. Frizzell.

Thereupon, the respondent filed a motion to quash the writ of quo warranto on sundry grounds therein stated, and also demurred to the petition as bad in substance.

The motion and demurrer having been fully argued and submitted, the case is now before the Court upon the several questions therein raised.

Questions for Decision.

Two general questions arise upon this record, viz.:

1st. Is the relator an "interested person" within the meaning of the Code, and therefore entitled to maintain this proceeding?

2nd. Has the Court the power to review the action of the President of the United States and of the Senate in appointing and confirming the respondent to the office of Commissioner of the District of Columbia, and is their action binding upon the Court?

38

I.

Is the Relator an "Interested Person" Within the Meaning of the Code, and Therefore Entitled to Maintain This Proceeding?

The answer to this question must be found in the reason and purpose for which the statute was passed, as indicated by the various provisions contained in it.

The first section (§1538) provides for the issuance of the writ against two classes of persons:

1. Those who usurp public offices.

2. Usurpers of private offices, to-wit, "in any domestic corporation."

The second section (§1539) provides that the proceedings may be instituted by the Attorney General or the District Attorney:

1. On his own motion; or

2. "on the relation of a third person."

The third section (§1540) provides that the proceedings may, in the event of refusal by the Attorney General and the District Attorney, be instituted on the relation of an "interested person."

The relator does not, of course, come within the provisions of §1539 of the Code, which deals only with proceedings instituted by the Attorney General or the District Attorney. Had either of those officials seen proper to do so they could doubtless (under §1539) have instituted this proceeding, or authorized it to be instituted, on the relation of the relator as a "third person" within the meaning of §1539, which section is substantially identical with
39 §607 of the Code of North Carolina which was construed in Foard v. Hall, 111 N. C. 369, 370, to entitle "a voter or taxpayer" to bring the action "by leave of the Attorney General."

The relator in this case, however, is here without the leave of the Attorney General or District Attorney, and therefore whatever rights he may have must be found in §1540 of the Code, which expressly limits the right thereunder to an "interested person," instead of using the term "a third person" which was employed in drafting the preceding section. Congress must have intended the term "interested person" to be given a more limited meaning than the general term "a third person" which it made use of in the preceding section in dealing with proceedings instituted by public authority, and the reason for limiting and restricting the character of persons who may, without the leave of the public prosecutors and against their judgment, bring proceedings against public officers is manifest. Had it not been for the fact that §1540 covered offices in private corporations as well as public offices, all question in this case could readily have been avoided by the use of the words "person claiming the same office" instead of "interested person." But, in view of the fact that §1540 did not relate solely to public offices, Congress was obliged to use the term "interested person" in order to preserve the rights of stockholders in private corporations to proceed against persons wrongfully holding offices in such corporations.

It is contended on behalf of the relator that the succeeding section

(§1541) conclusively shows that Congress did not intend the term "interested person" in §1540 as synonymous with "person
40 claiming the same office" in the matter of public offices. §1541 reads as follows:

"SEC. 1541. Relator Claiming Office.—When such proceeding is against a person for usurping an office, on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office."

It is argued on behalf of the relator that the use of the words "When such proceeding is * * * on the relation of a person claiming the same office" shows that Congress necessarily contemplated that the proceeding might also be brought by some one other than a person claiming the office, and that Congress must therefore have contemplated that a citizen and taxpayer might bring the proceeding against a public officer. Insofar as the contention is that Congress contemplated that the proceeding might be brought "against a person for usurping an office" by someone other than "a person claiming the same office," the contention is undoubtedly sound, because it is manifest from the other sections of the statute already referred to that Congress not only contemplated, but expressly provided, that the Attorney General or District Attorney might bring the proceeding, and might bring it either upon their own motion or on the relation of a third person, and such third person, moreover, would not, in such event as already stated, have to be a person claiming the office. Then again, as already stated, all of these sections deal in a general way with both public and private offices, and no one of them is restricted to proceedings against public officers alone, and for that additional reason Congress necessarily contemplated that proceedings for "usurping an office" (not limited to public office) might be brought by someone other than "a
41 person claiming the same office," because a stockholder in a corporation should, of course, have the right to institute the proceeding as against one wrongfully holding an office in the corporation, as already observed. There is, therefore, no ground for the contention of the relator that, because §1541 contemplates that the proceeding may be brought by some one other than "a person claiming the same office," it necessarily includes a citizen and taxpayer.

Not only does the statute not necessarily contemplate the bringing of a proceeding such as this by a citizen and taxpayer to remove from office a public official, not because he claims the office himself, but on behalf of the general public, but it should be clear and manifest that the statute does contemplate it, before a Court should recognize it.

The Attorney General and the District Attorney are, by the express terms of §1539 of the Code, given exclusive power, in the first instance, to institute proceedings against a person who usurps a public office, thus clearly indicating the policy of the statute itself, viz., that "where any person usurps, intrudes into or unlawfully holds or exercises within the District of Columbia a public office," that is, an office in which the general public is interested, then, as

such public officers having a public duty to perform, they are to exercise their discretion in the matter, and may bring a proceeding in quo warranto either on their own motion or on the relation of a third person. This being so, it would be an exceptional situation, and his right so to do must be clearly manifest, before the Courts would be justified in permitting a taxpayer or other citizen
42 to prosecute such a proceeding, even though these officers had refused to do so on the request of such taxpayer or other citizen. Manifestly, it is the policy of the statute, where the right to hold a public office, not against some person claiming it, but against the general public, is involved, that the duty and power to test such right by a writ of quo warranto rests with the public representatives named in the statute, and not with a private citizen or taxpayer, who has no interest in the office which is not common to every other citizen and taxpayer.

By the term "a person interested" as used in this statute is not mean any person, nor any taxpayer, but any person having an interest in the office personal to himself, as distinguished from other taxpayers and the general public.

In State v. Stein, 13 Nebr. 529, 532, the Court said:

"Where a private person has no direct interest in the result of the action it cannot be maintained by him because the public alone are interested. At common law the information was filed by the attorney-general on his own motion, or by the master of the crown office. * * *

Our statute has not changed the common law in that regard as to the law officer of the state, except that it permits prosecuting attorneys to institute proceedings on cases arising in their respective districts. But where the state at large is interested the attorney-general, as at common law, is the proper party. As the information fails to state facts showing the relator's right to the office in question, it does not state facts to constitute a cause of action."

In Miller v. Town of Palermo, 12 Kan. 21, 23, the Court said:

"The language used, it is true, is general; 'an interest'—'any interest'—are the terms employed. But this general language must be construed with reference to the purpose of the section. This, as we have seen, and is evident, is to regulate the form in which such actions shall be brought; and language thus used should be con-
43 strued as having reference to rights of action already existing, rather than as creating new rights. The plaintiffs here show no interest adverse to the corporation defendant peculiar to themselves or different from those of the community in general. Hence, if they are authorized to maintain this action, any taxpayer and citizen of the community can summon the corporation into court to try the validity of its existence."

In State v. Matthews, 44 W. Va. 372, 384, the Court, after an exhaustive review of the authorities, said:

"My conclusion, therefore, is that the weight of authority that I have been able to examine clearly indicates that a party to be entitled to file an information in the nature of a writ of quo warranto in a case like the one presented for our consideration must be in-

terested otherwise than as a citizen and taxpayer. If it had been intended that any person could apply, without qualification, why was it thought necessary to add the word 'interested' in the statute?"

In Vrooman v. Michie, 69 Mich. 42, 45, the Court said:

"There is nothing in the statute indicating that the relator is to represent the public. This would be contrary to all of our system of public prosecutions and suits on behalf of the people. The statute provides no means of intervention in such cases to save the public interests, which it would be dangerous to leave subject to private handling."

There are authorities, it is true, which hold that a citizen and taxpayer has such an interest in the due administration of public affairs as will entitle him to institute proceedings to oust an incumbent unlawfully assuming to usurp the functions of one of the public offices of the city in which such taxpayer resides. Such a holding was made in Churchill v. Walker, 68 Ga. 681, Davis v. City Council, 90 Ga. 817, and Crovatt v. Mason, 101 Ga. 246, cited by the relator, but the statute of Georgia upon which those decisions were based expressly provided:

"The writ of quo warranto may issue to inquire into the right of any person to any public office, the duties of which he is in fact discharging; but must be granted at the suit of some person either claiming the office, or interested therein."

44 It was entirely competent, of course, for the legislature of Georgia to so expressly provide that a private person other than a claimant for public office might institute proceedings to oust a person discharging the duties of such public office, but the statute in this District does not so provide.

In State v. Kohnke, 109 La. 838, also cited by the relator, it was likewise held that a resident and taxpayer could institute such a proceeding, but the language used in the statute of Louisiana was "any person" and not an "interested person." Moreover, in the earlier case of Voisin v. Leche, 23 La. Ann. 25, it was held that the words "any person" did not authorize a citizen and taxpayer to institute such proceeding.

In Foard v. Hall, 111 N. C. 369, another case cited by the relator, the language of the statute was "any private party," which is obviously quite different from the provision in the statute of this District.

In State v. Vail, 53 Mo. 97, also relied upon by the relator, the Court said: (at p. 109)

"Neither here nor under the Statute of Anne is the relator necessarily a claimant of the office alleged to be usurped by the defendant. The information is filed by the proper officer 'at the relation of any person desiring to prosecute the same.'"

It will thus be observed that the language of the statute construed in this Missouri case was "any person," and not an "interested person." Furthermore, the proceeding in that case was brought by the Attorney General, although on the relation of a citizen and taxpayer, as distinguished from the present proceeding which is brought with-

out the leave and against the judgment of the Attorney
45 General and District Attorney.

The other cases cited on behalf of the relator are also cases in which the statute construed either used the broad language "any person" which is found in the Statute of Anne, or other language which was construed by the Court to be equally as broad.

It is argued, however, on behalf of the relator that it is the settled law of this District that a taxpayer can maintain a bill in equity to enjoin the Commissioners of the District from making illegal disbursement of public funds, and that, therefore, by analogy (as they contend), a quo warranto proceeding against one of the Commissioners of the District can be maintained by a taxpayer.

In the first place, the Court is unable to agree that the analogy between an injunction proceeding and a quo warranto proceeding, contended for, exists. Quo warranto proceedings are regulated entirely by statute.

In the second place, although it is true, as contended by the relator, that in Downing v. Ross, 1 App. D. C. 251, 254, the Court of Appeals stated:

"As said by the Supreme Court of the United States, in Crampton v. Zabriskie, 101 U. S. 601, 609, 'in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases.'"

yet it is also true that in the recent case of Millard v. Roberts, 202 U. S. 429, 438, the Supreme Court of the United States dismissed a bill brought by a taxpayer, and, in doing so, expressly said:

"We have assumed that appellant, as a taxpayer of the
46 District of Columbia, can raise the questions we have considered, but we do not wish to be understood as so deciding."

It cannot, therefore, be said at the present day to be the settled law that a taxpayer can maintain even a bill for injunction against the Commissioners of the District in relation to a matter of strictly public concern.

Moreover, in the light of the peculiar character of the municipal organization of the District of Columbia, where our general organic law does not give to the Commissioners the usual and ordinary powers conferred upon municipal corporations by the several States, and who are without authority to even raise revenues for the support of our local government or to expend the same at discretion, it could in no event be properly said, as it seems to the Court, that the relator, merely as a citizen and taxpayer, has a substantial interest in the question of who may occupy the offices of the Commissioners of the District of Columbia. As was said by the learned Chief Justice of the Court of Appeals in Walter v. Macfarland, 27 App. D. C. 182, 184-5:

"The municipal organization of the District of Columbia is of a peculiar character. There is no general organic law covering all of

the ordinary powers usually conferred throughout the several States of the Union,—no formal municipal charter, so to speak. * * *

The Commissioners have no authority to raise revenues for the support of the local government, and those raised by the direct authority of Congress are not turned over to them for appropriation and expenditure at discretion."

By his petition, the relator, Frizzell, bases his right to institute this suit, not upon any interest that he claims in the office that is not common to all other taxpayers and the general public, but simply on the ground that, being a citizen and taxpayer of the District of Columbia, he is an "interested person" within the meaning of the statute. For the reasons already stated, both upon principle and authority, this contention must be overruled.

47

II.

Has the Court the Power to Review the Action of the President of the United States and of the Senate in Appointing and Confirming the Respondent to the Office of Commissioner of the District of Columbia, and is Their Action Binding Upon the Court?

In the leading case of Marbury v. Madison, 1 Cr. 137, 166-7, the Supreme Court of the United States said:

"The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion."

Hence, there could be no review by the Courts of the exercise of such power in any case, so long as the law imposes no restrictions or limitations. But the law (Act of Congress approved June 11, 1878 establishing a permanent form of Government for the District of Columbia) has specifically imposed the following restriction upon the appointment of the civil Commissioners of the District of Columbia:

"The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else."

It is, however, contended by counsel for the respondent that, notwithstanding this limitation of the law, the action of the President in making this appointment by and with the advice and consent of the Senate, was purely the exercise of executive discretion, and hence that, even though this limitation of law be clearly and plainly violated, this Court would be without jurisdiction to grant relief in any proceeding whatever. This contention is unsound. While it is true that the Courts are without jurisdiction to review or in any wise disturb the action of the President or other public official in the exercise of official discretion, the Courts are not without jurisdiction to review such action where a positive prohibition of law has been violated. If it were not so, then the President of the United States and the heads of the various depart-

48

ments of the Government would be above the law, and therefore free to violate it.

In the Floyd Acceptances, 7 Wall. 666, 676-7, the Supreme Court of the United States said:

"We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."

Again in Yick Wo v. Hopkins, 118 U. S. 356, 369-70, the Supreme Court said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power."

49 The contention on behalf of the relator in the case at bar, however, seems to be as extreme, on the one hand, as is the contention on behalf of the respondent, on the other hand. He proceeds upon the theory that the Court will inquire de novo into the qualifications of the respondent upon his simple allegation that the respondent does not possess the legal qualifications.

In the first place, the Court must presume that the President and the Senate did inquire into these qualifications and found them to be sufficient under the law, and that they were in the exercise of a reasonable discretion in reaching their conclusion.

In Stanley County v. Coler, 190 U. S. 437, the Supreme Court of the United States distinctly recognized that there is a prima facie presumption that the duties of public officers were properly exercised, and that conditions to warrant their acts were ascertained by them to exist, before acting.

The same rule had been previously announced by the Supreme Court in three other cases. In Gonzales v. Ross, 120 U. S. 605, 616, the Supreme Court said:

"Besides, the commissioner was a public officer, having a public duty to perform, and in the absence of evidence to the contrary, the presumption would be, that he acted in accordance with the law as known at the time."

In Knox County v. Ninth National Bank, 147 U. S. 91, 97, the Supreme Court also said:

"It is a rule of very general application, that where an act is done which can be done legally only after the performance of some

prior act, proof of the later carries with it a presumption of the due performance of the prior act."

Then again, in Nofire v. United States, 164 U. S. 657, 660, the Supreme Court said:

50 "The fact that an official marriage license was issued carries with it a presumption that all the statutory prerequisites thereto had been complied with. This is the general rule in respect to official action."

In the absence, therefore, of some proper showing to the contrary, this presumption of the law must stand, as binding upon the Court and the parties. And, as this case now stands, not only is there an entire absence of showing in the relator's petition that the President and Senate did not pass upon the legal qualifications of the respondent, or that his appointment was the result of the exercise of arbitrary power, but, on the contrary, the relator, by his petition, makes it perfectly clear and conclusive that the very point in question, viz, whether the respondent was eligible under the law to the office of Commissioner, was duly inquired into and considered by both the President and the Senate before the appointment was made.

By his petition, the relator—

"gives the Court to be informed that on, to wit, the 26th day of June 1913, the President of the United States nominated to the Senate one Oliver P. Newman to be one of the Commissioners of the District of Columbia appointed from civil life, and the nomination of the said Oliver P. Newman to the said office was thereafter by the Senate confirmed; and thereafter, to wit, on the 19th day of July, 1913, the said Oliver P. Newman took the prescribed oath and entered upon the said office and has ever since and yet holds the same."

To this petition he attaches sundry affidavits and exhibits which he makes a part of the petition. Among these exhibits, is a typewritten excerpt from the proceedings had before the Senate Committee selected by that body to inquire into and report upon whether the respondent was eligible to appointment as a Commissioner of the District of Columbia under the Act of Congress approved June

51 11, 1878. At the hearing before said Senate Committee, as shown by said exhibit, the respondent himself appeared, and was questioned fully and in detail as to his qualifications for the office of Commissioner, and especially as to whether he had been an actual resident of the District of Columbia for three years next before his appointment, and had, during that period, claimed residence nowhere else.

The question of the respondent's qualifications having been thus passed upon by the appointing power, in advance of the appointment, in the exercise of a reasonable discretion (as must be assumed in the absence of any averment or showing of arbitrary action), the question as to whether the respondent possesses the necessary legal qualifications is not now open to further inquiry.

In the early case of the United States v. Black, 128 U. S. 40, 48,

the Supreme Court of the United States laid down the rule (which has never since been questioned) that:

"The court will not interfere * * * with the executive officers of the Government in the exercise of their ordinary official duties."

It is only where the executive officers of the Government exercise arbitrary power that the courts can intervene, as was said in Garfield v. U. S. ex rel. Goldsby, 211 U. S. 249, 262 (affirming 30 App. D. C. 177):

"But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power.

In Morre v. U. S. ex rel. Boyer, 32 App. D. C. 243, 247, the Court of Appeals used the following language in stating both the rule and its limitation:

"This is clearly an instance of judicial interference with the discretionary power of an executive officer of the government. It is elementary that a court is powerless to direct the action of
52 an executive officer unless a positive legal right is being invaded by the officer, where the duty imposed upon him is clearly prescribed and enjoined by law. The duty, however, must be so plain and positive that the officer has no discretion left. Merrill, Mandamus, p. 64. * * *

We recognize the well-settled principle that courts will intervene to protect the citizen when his constitutional or legal rights are being invaded by the exercise of arbitrary power."

In the earlier case of Washington v. Johnson, 12 App. D. C. 545, 549-50, the Court of Appeals stated the rule as follows:

"The board had a discretion to exercise, and it has exercised it. There is no complaint that it has exceeded or abused its jurisdiction, or that it has in any manner acted harshly, unfairly or illegally. * * *

The act imposes upon the board the duty of investigation; and its performance of that duty is not subject to review or revision by the courts, except for abuse or excess, or for mistake of the law, which nowhere appear in the present instance."

In bates & Guild Co. v. Payne, 194 U. S. 106, 110, the Supreme Court of the United States further said (referring generally to qustions of fact decided by the executive departments):

"In such case the decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive."

The conclusion which this Court has reached, therefore, in the case at bar, is:

First. That the relator, as a citizen and taxpayer merely, is not entitled in any event to institute this proceeding; and

Second. That, even if he were, the petition must be dismissed, be-
53 cause it makes no showing that the determination by the President and the Senate as to the qualifications of the respondent was reached otherwise than in the exercise of a reasonable discretion, and, accordingly, their determination was final.

It follows that both the motion to quash the writ and the demurrer to the petition must be sustained, the writ quashed, and the petition dismissed; and it is so ordered.

THOS. H. ANDERSON, *Justice.*

Assignment of Errors.

Filed October 30, 1913.

* * * * * * *

Comes now the relator and appellant to the Court of Appeals and assigns the following errors upon his said appeal.

The Court erred:—

First. In reviewing the action of Mr. Justice Wright in directing the issuance of the writ of quo warranto and in overruling said justice in his holding that the petitioner was entitled to the said writ.

Second. In holding that the action of the President in nominating the respondent to the office of Commissioner of the District of Columbia and of the Senate in confirming such nomination was final and is conclusive of his eligibility to such office, and in the absence of a showing in the petition that such determination by the Presi-
54 dent and Senate was reached otherwise than in the exercise of a reasonable discretion precludes the courts from inquiring into such eligibility.

Third. In holding that the relator as a citizen and taxpayer was not entitled to institute this proceeding.

Fourth. In dismissing the petition and quashing the writ.

WM. J. NEALE,
A. A. BIRNEY,
JOS. W. BAILEY,
Attorneys for Appellant,
By W. J. N.

Memorandum.

April 24, 1914.—Mandate of Court of Appeals reversing judgment of October 21, 1913,—filed.

Supreme Court of the District of Columbia.

FRIDAY, April 24th, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Comes now the petitioner by his attorney Mr. Wm. J. Neale, and presenting to the Court the mandate of the Court of Appeals of the District of Columbia, filed herein this day, prays judgment in
55 conformity therewith. Wherefore it appearing by said mandate that the judgment of this court entered herein October 21st, 1913, is reversed with costs; it is ordered that the order of this

Court of October 21st, 1913, granting the motion to quash the Writ of Quo Warranto issued herein, as well as the order sustaining the demurrer to the petition and the dismissal of said petition be, and are hereby severally set aside and that said judgment of this Court be, and the same is hereby set aside, vacated and for naught held.

Further pursuant to said mandate, it is considered that the petitioner herein recover of the respondent for his costs on the appeal herein, the sum of Seventy-eight Dollars ($78.00), and have execuion thereof.

And now in accordance with said mandate, the said motion to quash the Writ of Quo Warranto issued herein, as well as the demurrer to the petition, are hereby severally overruled.

Answer and Pleas of Oliver P. Newman.

Filed May 4, 1914.

* * * * * * *

Now comes the said Oliver P. Newman into Court, by Ralston & Richardson, his attorneys, and protesting that said information is not sufficient in the law so that he is not bound to answer thereto, says that the United States ought not to implead him by reason of the averments in said information contained, and so answering says:

1. That he does not know, and, therefore, can neither ad-
56 mit -or deny whether the said William J. Frizzell is a citizen of the United States and is a taxpayer in his own right in the District of Columbia, and if deemed important prays strict proof thereof, although he admits that he there resides.

2. He admits the statement of the first and second sub-paragraphs of paragraph 2 of the said petition.

That he admits that on, to-wit, June 26, 1913, the President of the United States nominated to the Senate, Oliver P. Newman, the respondent herein, to be one of the Commissioners of the District of Columbia appointed from civil life, and that his nomination was thereafter confirmed by the Senate, and that on, to-wit, July 19, 1913, he took the prescribed oath and entered upon the said office, and has ever since, and yet holds, the same. He denies that he was not qualified in law to receive such an appointment, and that he has unlawfully assumed and usurped the said office, and is not lawfully entitled to the same, or to exercise the functions and enjoy the emoluments thereof. He denies that at the time of his appointment, he had not been an actual resident of the District of Columbia for three years next before his appointment to said office, and denies that he had ever claimed residence elsewhere than in the District of Columbia during said period of three years, although he admits that at various times during said period, he had had other temporary business addresses, not residences.

He denies that the petitioner ever made legal application to the Attorney of the United States for the District of Columbia to bring

proceedings by quo warranto to determine the right of this
57 respondent to the said office of Commissioner of the District of Columbia, or that, in connection with any such application, the attorney of the United States for the District of Columbia ever refused to institute the same.

3. The said respondent, for further plea to said petition for quo warranto, says that he was nominated by the President of the United States to the Senate to be one of the Commissioners of the District of Columbia appointed from civil life, on June 26, 1913, and was confirmed by the Senate, and on July 19, 1913, took the prescribed oath, entered upon said office, and has ever since, and yet holds the same, and that at the time of such appointment, he was, and for three years next thereto, had been an actual resident of the District of Columbia, and during such period had claimed residence nowhere else, and this he is ready to verify.

4. For a further plea to said petition, this respondent says that he was duly qualified to be appointed a civil commissioner of the District of Columbia at the time he was so appointed, and that such appointment was nominated to and duly confirmed by the Senate of the United States upon thorough review upon his qualifications for said office, and which body determined that he was qualified therefor within the meaning of the Statute, and such determination as to his qualifications was final and conclusive in law, and he claims the same benefit of this answer as if it were made by way of demurrer.

5. That this respondent is not guilty in manner and form as charged in said information.

6. That this respondent holds the said office of Commis-
58 sioner of the District of Columbia in conformity to law, was duly qualified, has met all legal requirements, and is lawfully entitled thereto; and he denies that he usurped or intruded into, or unlawfully holds the same, or has so done at any time from the commencement of this action or prior thereto, all of which things, the respondent is ready to verify.

Whereupon, this petitioner prays the judgment of this Court, that he go hence without day and have and recover his costs herein.

OLIVER P. NEWMAN.

DISTRICT OF COLUMBIA, *ss:*

Oliver P. Newman, being first duly sworn on oath, deposes and says that he is the respondent mentioned herein; that he has read the foregoing answer and knows the contents thereof, and that the facts therein stated as of his knowledge are true, and those stated upon information and belief, he is informed and believes to be true.

OLIVER P. NEWMAN.

Subscribed and sworn to before me this 4th day of May, A. D. 1914.

[SEAL.] LIVINGSTON S. JOHNSON,
Notary Public, D. C.

59 *Replication.*

Filed May 13, 1914.

* * * * * * *

Now comes the relator in the above cause, William J. Frizzell, by his attorneys, Joseph W. Bailey, Arthur A. Birney and William J. Neale, and joins issue upon the respondent'- pleas and answer and each and every of them.

JOS. W. BAILEY,
ARTHUR A. BIRNEY,
WM. J. NEALE,
Attorneys for the Relator.
By W. J. N.

Motion for New Trial.

Filed July 1, 1914.

* * * * * * *

Now comes the respondent, and, without prejudice to other motions submitted at this time, moves for a new trial upon the following grounds:

1. Because of error committed in granting the relator the right to open and close the testimony.
2. Because of error committed by the court in allowing the relator the right to open and close the argument before the jury.
3. Because of the erroneous admission of testimony offered by the relator over respondent's objection.
4. Because of the erroneous rejection of testimony offered by the respondent.

60 5. Because of the wrongful refusal of prayers for instructions offered by the respondent.

6. Because the verdict of the jury was against the evidence.
7. Because the verdict of the jury was against the weight of the evidence.
8. For other causes to be stated on the hearing.

RALSTON & RICHARDSON,
GEORGE W. HOTT,
R.,
Respondent's Attorneys.

Motion for Judgment Non Obstante Veredicto.

Filed July 1, 1914.

* * * * * * *

Now comes the respondent, and, without waiving other motions at this time made, moves the Court to enter up judgment herein in favor of the respondent, and for cause says—

1. That the power to determine the qualifications under the law of the respondent as Civil Commissioner of the District of Columbia rested primarily with the President and Senate, and as it appears from the petition that the advice and consent of the Senate was only given after a thorough examination into his qualifications and a determination that he was qualified, as appears from the petition, no power to review such action rests in any court or jury, and unless in any event the court could have charged the jury that there
61 was no evidence at all tending to show the respondent's qualifications and justifying the Senate's action, (and it could and did not so charge,) such a revision of the Senate's action by a court or jury would be a violation of the constitutional separation of the powers of government.

2. The relator in his petition does not show that he has such an interest in the writ that he was entitled to invoke the jurisdiction of this Court, the Attorney General or United States Attorney for the District of Columbia alone, if anyone, being entitled to bring the action.

3. That this respondent having been appointed a Civil Commissioner of the District of Columbia, as shown by the petition, by the President of the United States and confirmed by the Senate, their conclusions are final, and no power of review of his qualifications resides in any court or jury, and the exercise of such power would be an infringement upon the powers of a co-ordinate branch of the government.

4. That the appointment of this respondent is for the term of three years, but that during such period of three years, he is subject to removal by the President at all times, and that a writ of quo warranto will not run in any instance where the appointee is at all times subject to removal by the appointing power.

5. That the Attorney General of the United States having refused to file the petition of quo warranto asked for by the relator, and his action being based upon the manifest fact that no public interest would be subserved in the prosecution thereof, such determination on his part was conclusive, the United States Attorney for the District of Columbia not having acted in a contrary sense.

62 6. That the relator has not shown any interest in the office itself as contemplated by the Statute and has therefore no interest upon which could be based any petition for quo warranto as herein granted.

7. That no inquiry was made by the Court prior to the issuance of the writ as to the motives of the relator, which should have been had to determine whether the discretion of the Court ought to be exercised to permit the filing of the petition.

8. That it does not appear that the United States District Attorney for the District of Columbia ever refused to institute this proceeding on the request of the relator, and said relator has therefore no right to institute the said proceeding on his own behalf.

9. That it does not appear from the petition that any public in-

terest whatsoever was subserved by its filing and such a writ may not be used for private purposes.

RALSTON & RICHARDSON,
GEORGE W. HOTT,
R., *Respondent's Attorneys.*

Motion in Arrest of Judgment.

Filed July 1, 1914.

* * * * * * *

Now comes the respondent, and, without waiving other motions at this time made by him, moves that the judgment in the above entitled cause be arrested, and for cause says:

63 1. That the power to determine the qualifications under the law of the respondent as Civil Commissioner of the District of Columbia rested primarily with the President and Senate, and as it appears from the petition that the advice and consent of the Senate was only given after a thorough examination in his qualifications and a determination that he was qualified, as appears from the petition, no power to review such action rests in any court or jury, and unless in any event the court could have charged the jury that there was no evidence at all tending to show the respondent's qualifications and justifying the Senate's action, (and it could and did not so charge,) such a revision of the Senate's action by a court or jury would be a violation of the constitutional separation of the powers of government.

2. The relator in his petition does not show that he has such an interest in the writ that he was entitled to invoke the jurisdiction of this Court, the Attorney General or United States Attorney for the District of Columbia alone, if anyone, being entitled to bring the action.

3. That this respondent having been appointed a Civil Commissioner of the District of Columbia as shown by the petition, by the President of the United States and confirmed by the Senate, their conclusions are final, and no power of review of his qualifications resides in any court or jury, and the exercise of such power would be an infringement upon the powers of a co-ordinate branch of the government.

4. That the appointment of this respondent is for the term of three years, but that during such period of three years, he is subject to removal by the President at all times, and that a writ of

64 quo warranto will not run in any instance where the appointee is at all times subject to removal by the appointing power.

5. That the Attorney General of the United States having refused to file the petition of quo warranto asked for by the relator, and his action being based upon the manifest fact that no public interest would be subserved in the prosecution thereof, such determination

on his part was conclusive, the United States Attorney for the District of Columbia not having acted in a contrary sense.

6. That the relator has not shown any interest in the office itself as contemplated by the statute and has therefore no interest upon which could be based any petition for quo warranto as herein granted.

7. That no inquiry was made by the Court prior to the issuance of the writ as to the motives of the relator, which should have been had to determine whether the discretion of the Court ought to be exercised to permit the filing of the petition.

8. That it does not appear that the United States District Attorney for the District of Columbia ever refused to institute this proceeding on the request of the relator, and said relator has therefore no right to institute the said proceeding on his own behalf.

9. That it does not appear from the petition that any public interest whatsoever was subserved by its filing and such a writ may not be used for private purposes.

RALSTON & RICHARDSON,
Respondent's Attorneys.

65 Supreme Court of the District of Columbia.

TUESDAY, July 7th, 1914.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

* * * * * * *

Upon consideration of the motions for Judgment non obstante veredicto, for a new Trial, and In Arrest of Judgment, filed herein on behalf of defendant by his attorneys of record; It is ordered that the same be, and are hereby, severally overruled and judgment on the verdict rendered herein on the 26th day of June, 1914, is ordered. Whereupon, it appearing from the verdict aforesaid, that the said defendant, Oliver P. Newman, hath been found guilty of the act of Usurping the Office of Commissioner of the District of Columbia; therefore, it is considered that the said Oliver P. Newman, shall in no wise intermeddle with the place, office, liberties, privileges and franchises of said office, nor, in any manner intermeddle or concern himself in and about the holding of, exercising or using the same; that from henceforth he be, and hereby is, wholly forejudged, ousted and excluded from the said office of Commissioner of the District of Columbia.

Furthermore, it is considered that the Relator recover of the said defendant his costs of suit to be taxed by the Clerk and have execution thereof.

From the foregoing, the defendant by his attorneys, in open court, notes an appeal to the Court of Appeals, whereupon the penalty of a bond to operate as a Supersedeas is hereby fixed in the sum of Two Hundred Dollars.

66 *Memorandum.*

July 7, 1914.—Supersedeas bond approved and filed.

Assignments of Error.

Filed August 1, 1914.

* * * * * * *

Comes now the respondent, by Ralston & Richardson and G. W. Hott, his attorneys, and assigns the following error committed by the Supreme Court of the District of Columbia in this case:

1. The Court erred in refusing to permit the respondent to show that the facts developed in the testimony in this case had been furnished by him and by others to the Senate Committee examining the matter of his residence qualifications before confirmation of his appointment as civil commissioner for the District of Columbia.

2. The Court erred in refusing to allow the respondent to show that a full statement of facts relating to his residence qualification, which facts were submitted in evidence in this case, had been submitted to and passed upon by the President at the time of his appointment to the office of civil commissioner of the District of Columbia.

3. The Court erred in holding that it was proper for the jury to pass on the question whether as a fact respondent was an actual resident of the District of Columbia for three years preceding
67 his appointment, although said fact had been examined and decided by the President, and also by the Senate in confirming respondent's appointment, upon substantially the same evidence as was before the jury in this case.

4. The Court erred in holding that it had the power to review and reverse the action of the President and Senate in nominating and confirming the respondent in his office.

5. The Court erred in holding that the relator had sufficient interest to bring and maintain this action.

6. The Court erred in granting the petitioner the right to open and close the evidence and the right to open and close the argument to the jury, and in refusing the request of the respondent to open and close the evidence.

7. The Court erred in refusing to grant the several prayers for instructions submitted by the respondent to be given to the jury, and each of them.

8. The Court erred in overruling the respondent's motion for a new trial upon the several grounds assigned in said motion.

9. The Court erred in overruling respondent's motion for judgment non obstante veredicto for the several reasons assigned therein.

10. The Court erred in refusing to grant the respondent's motion for arrest of judgment for the several reasons assigned therein.

RALSTON & RICHARDSON,
G. W. HOTT,
Attorneys for Respondent.

Copy of above served on me this 1st day of August 1914.
J. N. ENGLAND.

68 *Designation of Record on Appeal.*

Filed August 1, 1914.

* * * * * * *

The Clerk of this Court will please include in the transcript of record of the above entitled cause on appeal to the Court of Appeals the following papers:

1. The exceptions and objections of Oliver P. Newman to the filing of this cause and the issuance of the writ of quo warranto filed in this cause on September 2, 1912.
2. The petition and exhibits thereto attached of the relator, William J. Frizzell, filed herein on September 2, 1913.
3. The order of Mr. Justice Wright, dated September 2, 1913, granting leave to William J. Frizzell to file his petition herein. Memorandum of filing of bond as directed in the preceding order.
4. The order of Mr. Justice Wright, dated September 2, 1913, directing the writ of quo warranto to issue.
5. The writ of quo warranto.
6. Memorandum of return of service by the marshal.
7. Memorandum of the appearance of defendant, Oliver P. Newman, by his counsel.
8. Motion to quash the writ of quo warranto and the demurrer to petition filed by the defendant September 24, 1913.
9. Judgment of the Court of October 21, 1913, quashing the writ of quo warranto and sustaining the demurrer to the petition and dismissing the same.

69 10. Memorandum of noting of appeal to the Court of Appeals in open court on October 21, 1913.

11. The opinion of the Court filed October 22, 1913.
12. The assignment of errors filed October 30, 1913.
13. Memorandum of the filing of mandate of the Court of Appeals reversing judgment of October 21, 1913.
14. Judgment on mandate entered April 24, 1914.
15. Answer of respondent filed May 4, 1914.
16. Joinder of issue on respondent's answer.
17. Bill of Exceptions.
18. Respondent's motion for new trial.
19. Respondent's motion for a judgment non obstante veredicto.
20. Respondent's motion for arrest of judgment.
21. Order of Court overruling respondent's motions and entering judgment of ouster, fixing bonds for costs and supersedeas on appeal (July 7, 1914).
22. Memorandum showing filing and approval of bonds for costs and supersedeas on appeal (July 7, 1914).
23. Specification of errors.
24. This designation of record on appeal.

RALSTON & RICHARDSON,
G. W. HOTT,
Attorneys for Respondent.

70 *Memorandum.*

August 14, 1914.—Bill of Exceptions submitted and time to settle same extended to and including August 31, 1914, and to file transcript of record extended to and including September 2, 1914.

Supreme Court of the District of Columbia.

MONDAY, August 31.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions taken at the trial of this cause, and heretofore submitted, now orders the same of record, nunc pro tunc.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56157 at Law, wherein United States of America, ex rel. William J. Frizzell is Petitioner and Oliver P. Newman is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 1st day of September, 1914.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Ass't Clk.

72 In the Supreme Court of the District of Columbia.

Law. No. 56157.

UNITED STATES ex Rel. WILLIAM J. FRIZZELL
vs.
OLIVER P. NEWMAN.

Now comes the respondent, Oliver P. Newman, by Ralston & Richardson and G. W. Hott, his attorneys, and tenders to the court here his Bill of Exceptions taken to the rulings of the court during the

trial of this cause and containing, in substance, all of the testimony offered therein or being presented before the court, and prays that it may be duly signed, sealed and made a part of the record now for then, which is done accordingly.

Bill of Exceptions.

Be it remembered that upon the trial of this cause before Mr. Justice Gould the following is the substance of all the evidence offered in this cause material to the issues:

The Court held that the affirmative of the issues rested with the relator and that he was entitled to open and close, to which ruling the defendant then and there objected and excepted in open court, which exception was allowed.

WILLIAM J. FRIZZELL, the relator, being sworn, testified that he had resided in Washington over seventy years, was a tax payer upon real estate; that before the institution of the proceedings in this cause he made written demands first upon the Attorney General of the U. S. and second upon the Attorney of the United States for the District of Columbia to take proceedings to test the right of the respondent to the office of Commissioner, and that he received the answers in writing which are attached to the original petition.

73 To the admission of this letter, signed by J. M. Proctor, Assistant, the respondent then and there objected on the ground that the Assistant could not act for the District Attorney in such a matter, and that said letter expressed the refusal of the assistant to act and did not purport to be the act of the District Attorney, which objection was overruled, and exception noted and allowed.

CLARENCE R. WILSON, being produced on behalf of the relator, testified that he was United States District Attorney for the District of Columbia in August, 1913, that he was then in England; that he had never instituted any proceedings against Oliver P. Newman concerning his office as Commissioner; that he returned to the United States after September 15; that during his absence Mr. James M. Proctor, Assistant U. S. Attorney was in charge of the business of the office; that witness knew of the foregoing letter from Mr. Proctor who wrote him at about the time of the receipt of the letter from Mr. Frizzell and of his action which witness approved.

On cross-examination he stated that he was not informed of the writing of such letter before it was written and did not authorize the writing of it.

OLIVER P. NEWMAN was produced and sworn as a witness for the relator and testified that he was the respondent, was born in Lincoln, Nebraska, in 1877, resided there until seven years old. After living in various places, returned to Des Moines in the fall of 1898 and remained there until July or August, 1901. Began newspaper work there as a reporter. Left Des Moines in July, 1901, for Washington;

remained working in Washington until November, 1902, went to New Mexico on account of his health, and was there until the 1st of April, 1904.

After living in various cities where he engaged in newspaper work, he came to Washington in March, 1910. Was employed as editorial writer on the Washington Times. Was then married, his family consisting of his wife, who had a son, relator's step son, who at that time was with her parents in Texas. After getting employment on the Times he remained here until July of the following year, 1911, when he went to Chicago. The first summer in Washington, lived in the Kenesaw Apartment House, in a furnished apartment. The next winter lived at the Westminster, 17th and Q, up to the time he left in July 1911. Then went to Chicago under a new employment by the Newspaper Enterprise Association. His wife joined him there, as a short time before she had been called to Texas on account of the health of her father. Her son joined them a little later. Previous to that he had not been living with the witness. His household consisted of really two families, witness' wife, boy and himself, and wife's father and mother, all occupying the same dwelling. Took a furnished apartment, having no household furniture at all. Sent the boy to the public school in Chicago, recollection is that his mother entered him. Recalled going with her one day to see one of the Assistant Superintendents about which school he should enter, but recollection is that was the only information he had about it. During his stay in Chicago he did newspaper work, which called him to a great number of places in different states. Went at least twice to New York and to Washington twice in the fall of 1911 and winter of 1911-12. Was there just a day or two each time, staying with friends. In New York stayed at a little hotel called the Judson. Does not recall how he registered. Usually when working out of Chicago he registered as from Chicago so has no doubt he did so at Hotel Judson. Was in Washington at least three times in the winter of 1912-13, remaining just over Sunday, or a day. On one occasion was here just a few hours, first time in 1911-12 stayed with friends. The next visit his wife was here and again living at the Westminster and he stayed there. His wife returned to Washington in November, 1912, going back to the Westminster with the boy, taking a furnished apartment. During the winter of 1912-13 was with President-elect Wilson wherever he was, most of the time at Princeton and Seagirt, coming down here two or three times. He was still engaged in newspaper work. At one time he was engaged in dramatizing a play; that was in the winter of 1912 in New York City. At no time working on that exclusively. Had three duties when in New York covering a period of two or three months. First, political newspaper work for
75 the Newspaper Enterprise Association, then part of the time at its bureau in New York looking after some of the work of the bureau, his connections with the bureau were very largely advisory. The third business, evenings and such time as he could dovetail in, he worked on the play. Was at Baltimore at the time of the Democratic National Convention, in June, 1912. Stayed at

Hotel Caswell. His name was registered there. Reservations had to be made at the hotel for the force of men doing the work for the United Press and the Newspaper Enterprise Association, reservations were made by the General Manager of the United Press. When he went to the hotel he said—"You have a reservation for me?" They said—"Yes, we have a reservation for you", and he took it. Witness' impression is that he did not even sign the register, but his name had been already entered, though he may be mistaken as to that. Bills for all who were there were sent to one man in New York. Came to Washington in the spring of 1913, the third of March, registered at the Shoreham as from Princeton. During the time he was employed in New York and Princeton his families were in Chicago up to November, 1912, and he went there frequently. When he finished any work in New York he returned to Chicago, went to New York twice, the first time remained from October until after the holidays, went again in January, 1912. Between those dates was in Chicago and remained in Chicago during the intervening time, something less than a month. Went to Chicago because of business connected with the office, incidentally spent the holidays with his family, but his reason for going was a business one. His employer was about to leave Chicago for California to be gone sometime and they had a great many things to plan for.

Cross-examination:

Sought employment in Washington in 1901. Was then in Des Moines, Iowa; got on the Washington Post, afterwards on the New York American and the Washington Times. Came to Washington in August, 1901, and stayed until November, 1902. Loss of health caused his departure, was suspected of having tuberculosis
76 and recommended to go to New Mexico. At that time desired to remain and make his home here. Had had the desire to remain here before he came. Next came in March, 1910, because of solicitation of employment here on his part addressed to the manager of the Washington Times. Remained here some sixteen months, took an active part in a small way in public affairs in the District of Columbia; was a member of the Chamber of Commerce and Monday Evening Club, being Secretary of the latter; was active in the Chamber of Commerce, bringing to its attention the matter of improvement in the milk supply, had informed himself thereon and interested himself in it as an editorial writer, with the result that a special committee was appointed, which he assisted, supplying a great deal of information, and advised with the man who was writing the report. Took an active part in one of their elections as advocate of a candidate who was unsuccessful, was appointed on a special committee representing the Chamber of Commerce to appear before a Committee of Congress in advocacy of the Great Falls Power project, attending the meetings quite continuously. Took part with the convention committee in an effort to raise convention funds. Wrote the pamphlet which was the basis of the Committee's appeal in that undertaking. Was Recording Secretary of the Monday

Evening Club for about a year. It had two or three hundred members. In July, 1911, went away for a while. Had known Mr. W. B. Colver, of St. Paul, for several years. He suggested that witness come with the Newspaper Enterprise Association. From time to time witness talked about it without coming to any conclusion. Finally an agreement was made that he should enter its employment for a specific purpose. Witness imposed the condition that he would not permanently leave Washington, but the work wanted done was primarily the on coming Presidential campaign, a pre-convention ccampaign, and he wanted witness to go out to Chicago and make headquarters there to cover the middle west and to be in New York or wherever occasion demanded, to familiarize himself with the
77 political condition of all parties during the period preceding the convention and after the convention to keep on with that sort of work until election. Declined to accept his proposal except with the specific agreement, to which he acceded, that after election witness should be returned to the Washington Bureau. He agreed to this in July, 1911. Witness' intention was to return to Washington. Considered it the best city in which to do newspaper work in the United States and he wanted to stay in what he considered the best district. There was only one city in the country where it was more profitable and he intended to return because he was here and liked the city as a place to live. Every reason governing a man in the choice of a place to live caused him to intend to return. Had formed satisfactory friendships here, felt at home with newspaper work in Washington. Had been in Chicago before he went in July, 1911, very frequently. Had no desire to remove to Chicago—had every desire not to. Both were desirous that witness should go on with this work. When witness went to Chicago he expected his employment to continue until after the election of 1912. Chicago was selected as the headquarters of the Newspaper Enterprise Association and the central plant was located there and from there they distributed their news. It was a good point to gather up information as to the condition of affairs in the west, and politically a good center in a newspaper sense. Doubts if he was ever in Chicago sixty consecutive days. His work took him through the states of the West, to Washington and Baltimore. When he left Washington he talked over his intention of returning with quite a number of friends. Had a conversation on that subject with Mr. Siddons, Mr. Sims, representative from Tennessee, Mr. Louis Brownlow, William McClay Clayton, Tom Grant, Secretary of the Chamber of Commerce, and he believes Gilson Gardner and Raymond Pullman. It was very emphatically the wish and intent of Mrs. Newman that they should return here. In Chicago they lived in more than one place. Witness
78 was away a great deal of the time. They lived first in a furnished flat; then a little family hotel; then a boarding house; then a furnished flat in Evanston. This brought it up to the summer of 1912. Part of the time Mrs. Newman was with witness in the East on his assignment. The latter part of the time she was in a family hotel in Chicago. Had no permanent place of abode in Chicago. Had to rent from month to month because of

the temporary character of witness' work, knowing that he would sooner or later, right after the election or at the time of the inauguration, be back here.

Never registered or voted in Chicago, nor tried to, nor had any intention of so doing. Was in the East, at Washington, twice before the final assignment to Princeton or Seagirt, stayed with John Snure the first time and his recollection is he was with him the second time.

Registered from Chicago in different hotels because he was sending all his stuff to Chicago. For business purposes he desired to identify himself with the Chicago headquarters and registered from Chicago just as a travelling man would register from the wholesale house that he sells goods for is located. The association had an office in Chicago so that it was one of their recognized headquarters. Subsequently registered the name of his association instead of a town, or would register the name of the Newspaper Enterprise Association or United Press. All he knows of his name appearing in a Chicago directory was from the evidence submitted before the Senate District Committee by the Home Rule Committee opposing his confirmation. Never gave his name for such purpose, did not know it had been in the directory until the hearing before the Senate Committee. Authorized nobody to do it for him. At the time of the Baltimore Convention went to Baltimore from Chicago. That was in June, 1912. This was a continuation of the work originally engaged in for Mr. Colver and part of the same general undertaking. Had preparatory work to do in connection with it. After the nomination of Mr. Wilson was directed to go right to Seagirt where he was. The work at Seagirt was in continuation of the original work. Was taken away from Seagirt for a few days at one time, when he was sent to Iowa to see Mr. Bryan. This was
79 incident to the main purpose. He was sent because he had frequently been to see him and had known him personally. Except for that was with Governor Wilson and with the President elect until his inauguration. Had his wife with him at Seagirt during the summer about a month, and then in November had her, her mother and the boy. Sent them to Washington November 15, 1912, expecting to resume his residence. That was the sole purpose. They were located at the Westminster. Mrs. Newman went with him to Bermuda, and her mother and the boy constituted the rest of the family, living at the Westminster. Were in Bermuda a month. When they returned the middle of November Mrs. Newman came back, to the Westminster. She came to Washington, but witness had come down here for a day or two at a time and he took her to New York. When here in November he had located his family here. It was for the purpose of resuming, as quickly as possible, his residence in Washington. Was with the President up to noon of March 4th. Came on to Washington with him, went to the Shoreham hotel when he first reached here. His wife was already here at the Westminster, had been here all winter. His registry at the Shoreham hotel read from Princeton. He had no residence there and definitely abandoned the temporary work he had there with the

coming of the President to Washington. The object in registering from Princeton was that a large party of newspaper men on the same assignment had been notified to get registrations there in advance so that all the newspaper correspondents wrote down there and got their reservations at the Shoreham. The registering was a matter of identification, to be identified with the Wilson party in case their offices or anybody should be seeking them. From that time has been continuously physically present in the District of Columbia except for a sojourn of a few days. From the time he went with the Newspaper Association in July, 1911, he had been considered as belonging to the Washington Bureau and immediately after the inauguration returned to Chicago for a few days to talk over the Chicago office plans for the various things they had on hands to take up and do in the immediate future, and at that
80 time he actually did and his employers had actually effected and carried out the original agreement he had had with Mr. Colver, which was that he should be in the Washington Bureau permanently to do the various kinds of work they had to do here in Washington. Continued in that work in conformity with the agreement under which he left Washington.

"Q. Mr. Newman, did you prepare a statement in substance of the facts which you have narrated to the jury and submitted — to the President for your appointment?

Mr. BIRNEY: I object.

The COURT: How is that relevant, Mr. Ralston?

Mr. RALSTON: I think it is relevant, if your Honor please, as showing his intentions all the while and showing their consideration by the appointing authorities. That is, this question was considered by them at all times.

The COURT: As I understand the decision of the Court of Appeals it was that the question of residence for the statutory period was to be tried de novo here. Of course, if that is so, it would not make any difference about what any other official had decided in regard to it.

Mr. RALSTON: I submit the question. Do I understand the objection to be sustained, your Honor?

The COURT: Yes.

Mr. RALSTON: An exception is noted.

By Mr. RALSTON:

Q. I would like to ask this further question, which Mr. Birney doubtless will object to. State whether an examination into your qualifications was made by the Senate Committee on the District of Columbia, and whether in that connection you appeared before the Committee and made a statement.

Mr. BIRNEY: I object.

Mr. RALSTON: I want to say simply in regard to that, if your Honor please, that your Honor knows that this particular fact is set up in part in the petition in the case. Perhaps we might rest with that fact; but if we do not rest with it, it seems to me that it has been made competent by the petition itself.

81 The COURT: I fail to see its competency. I will sustain the objection.

Mr. RALSTON: I note an exception, if your Honor please.

By Mr. RALSTON:

Q. Mr. Newman, prior to your appointment by the President on the 26th day of June, 1913, did you submit a statement to him in substance showing what you have testified to and describing your intentions with relation to the absence about which you have testified?

The COURT: With relation to what?

Mr. RALSTON: As to *resident* when he took this absence from Washington.

Mr. BIRNEY: I object, on two grounds. First, because it would not be competent at all, because if such a statement were submitted in writing it has to be proved——

The COURT: The objection is sustained.

Mr. RALSTON: An exception, if your Honor please.

Recross-examination:

When witness came back, after inauguration, he was employed in the office of the newspaper syndicate; in the organization and placing of men in the Newspaper Enterprise Association, he was always considered as from the Washington Bureau. Between March, 1913, and July he was employed by the same Newspaper Enterprise Association here in Washington doing journalistic work.

The relator thereupon rested his case, whereupon counsel for the respondent submitted a prayer that the jury be instructed to return a verdict for the respondent. This was overruled by the court, whereupon an exception was noted by the respondent.

WILLIAM MCK. CLAYTON called as a witness on behalf of the respondent, being sworn, testified he saw and talked with respondent about one month before he left for Chicago. Respondent told him he expected to make Washington his home.

82 THOMAS GRANT, being first duly sworn, testified as follows: He is the Secretary of the Washington Chamber of Commerce. Respondent took an active part in the proceedings of the Chamber. Remembers about the time he left Washington to go to Chicago he had discussion with him relative to his intention. He said he was leaving the city for a while and wished to suspend his membership in the Chamber during his absence, promising at the same time he would rejoin the Chamber when he returned, which he did. Does not recall that he set any specific time for his return.

Cross-examination:

His membership was suspended from about 1911 until his return here, at least until after he became Commissioner.

W. B. COLVER, witness for relator, testified substantially as follows: In July, 1911, Newman was in the employ of the Newspaper Enterprise Association, of which witness was President and General Manager. He was employed as a travelling or field correspondent. Prior to 1911 he had been in the employ of the Washington Times. In April or May witness proposed to him — take a position with the Newspaper Enterprise Association to cover the pending Presidential compaign. He inquired as to the nature of the work proposed. Witness explained to him that he wanted him to travel pretty much all over the country in the pre-convention campaign and later in the campaign itself. Witness had offices in Washington, New York, San Francisco, Cleveland and Chicago. The principal office was in Chicago. The employment and salary were satisfactory, but Newman objected to taking the position if it entailed his having to leave Washington. Upon this point negotiations hung for some time. Witness finally agreed it was to be understood that after the election Newman was to return to Washington and continue in Witness' employment. He urged that he and Mrs. Newman had many friends in Washington and that it was home to them and did not want to give up a position on The Times which might result
83 in his being unable to secure a newspaper position in Washington after the election. Upon this point they were at odds until witness worked out a plan whereby Newman was to be added to the Washington bureau after election. The thing clear in witness' mind is that what he had to overcome in getting Newman to leave The Times was in getting a provision for his return to Washington and getting employment there after the election. His immediate work was to act as a roving correspondent, subject to witness' assignment, in various parts of the country prior to the nominating conventions, to conduct a straw ballot, be prepared to cover political headquarters, and to travel with candidates after the conventions. His return was to take place whenever his services could better be employed there than with the candidate, or after election, with the President elect. His absence from Washington was regarded as temporary and in making changes in organization and disposition of men he was never considered to be available for permanent assignment in any of witness' offices except Washington and witness so directed the editor of the Newspaper Enterprise Association when Newman joined it. On May 1, 1912, witness resigned the Presidency of the N. E. A. and made known to Harry N. Rickey of Cleveland, his successor, the obligation that ran to Newman to return to Washington for permanent assignment. He understood and assumed the pledge to Newman. Witness told Newman he had explained his matter to Rickey and the agreement for his return would be observed notwithstanding witness' resignation. Rickey did observe the agreement and returned Newman to Washington immediately after the inauguration of President Wilson. Newman was with President Wilson substantially all the time after the convention until the inauguration. The work which took him from Washington was temporary as the job must end when the campaign ended and he refused to accept the employment without an under-

standing and agreement he was to be attached to the Washington Bureau as a permanent assignment as soon as the campaign was done.

84 FREDERICK L. SIDDONS, being first duly sworn, on oath testified that he first met Newman in the early summer of 1910, was attracted to him by reason of his very great interest in everything that concerned the District of Columbia. In the following month witness met Newman at meetings of the Chamber of Commerce and had constant conversations with him about projects then under consideration by the Chamber of Commerce or Board of Trade. He became Secretary of the Monday Evening Club, an organization interested in question- concerning the welfare of the district, and witness saw more or less of him at the meetings, and if his memory serves him correctly, served on one or two of the committees with him. Was very active in the Chamber of Commerce and in everything that concerned the District of Columbia. Witness remembered that in July Newman came to his office and told him he was leaving his employment and was going out for a while to serve the Newspaper Enterprise Association. Witness was very much disturbed because he thought it meant he was leaving Washington for good and expressed deep concern, and asked him if it was permanent, and he promptly said "Oh no, this is only temporary. I would not have given up the employment here unless I had assurance, which I have obtained—I insisted in the agreement or terms of the employment that I should get the first assignment back home to Washington that they could find for me;" Witness said—"Are you sure that that can be carried out" and he said "Oh, I have no doubt of it", and witness' recollection is that he said that if he failed he would come back very speedily in some other way because Washington was the place he loved of all other cities he had ever lived in. Witness would always ask him when he would get back and he would tell of the progress of his work and witness' recollection is that he told him that if a political campaign that was then pending or the election went the right way he would certainly be back in Washington very shortly after the inauguration of the President.

85 THETUS W. SIMS, being first duly sworn, testified that he was a member of the House of Representatives; that he lived with Newman at the Westminster Apartment during the spring and summer of 1911. In a conversation about who would be back at the hotel the following winter Newman stated his intention was to come back as soon as he could.

GILSON GARDNER, being first duly sworn, said that he was connected with the Newspaper Enterprise Association and at present was in charge of its Washington Bureau. It was through witness that Colver met Newman and on his recommendation he finally employed Newman, who had had a long experience in gathering political matters. Needed a man who would specialize on the Wilson end of the campaign and the democratic end of it. Colver finally

engaged Newman with the understanding that he would take up the Wilson end and do the travelling with it and eventually he would come back and be associated with the Washington Bureau of the N. E. A. He was expected to come back here when he got through with his travelling with the President.

RAYMOND PULMAN, being first duly sworn, said he thinks he was one of the first ones Newman told about his going to Chicago in July, 1911. Newman told him in the spring of 1911 that he was leaving the Times and said—"I am not leaving Washington; I am going with the N. E. A., and will be back here." Witness visited Chicago the following fall in either October or November. He found him in his office and witness asked him when he expected to come back to Washington. Newman told witness he was coming back soon and thought he would be back in the course of six months. He expressed his desire to come back and of his considering Washington his home and that he was coming back.

LOUIS BROWNLOW, being first duly sworn, said that he knew of Newman talking with Colver at various times about going with the N. E. A. Witness was very anxious Newman should not leave Washington permanently and they "conspired" together to make it certain that it was nominated in the bond that he made with Mr. Colver that he was to be returned subsequent to the com-
86 pletion of the campaign work he was about to do, then of course having the pre-convention campaign only in mind at that particular time. Newman stated he did not want to leave Washington, did not want to go to Chicago permanently, considered Washington the best place to live in so far as creature comforts were concerned and the best from a professional standpoint, though the work was more interesting, especially in view of the fact that he expected to make political newspaper work his specialty and he did not want to take any engagement with any newspaper that would cause him to leave Washington permanently.

OLIVER P. NEWMAN being recalled, said that he came to Washington in March, 1910, with the intention and purpose of making Washington his home and remaining here permanently as one does in a permanent home.

Thereupon the testimony being closed, the relator and the respondent submitted the following prayers and asked that they be given by the court to the jury.

Relator's Prayers.

No. 1.

The jury are instructed that the respondent at the time of his appointment to the office of Commissioner of the District of Columbia in June, 1913 was not eligible to such appointment unless he had

been for three years next before such appointment an actual resident of the District of Columbia; and had not claimed residence elsewhere, and if they shall find that he was not such actual resident for such period of three years or had during such period claimed residence elsewhere they should find their verdict for the relator.

No. 2.

The Court instructs you that actual residence within the meaning of the foregoing instruction requires that the respondent, Oliver P Newman, shall have maintained an abode at which he and his family might sleep and eat, and if you find from the evidence that the said Newman did not maintain such an abode in the District of
87 Columbia, then you should find that he was not an actual resident of the District of Columbia for the time required by law and was not eligible to the Office of Civil Commissioner of the District of Columbia.

No. 3.

The jury are further instructed that while domicile is a mixed question of act and intention, the question of actual residence is purely one of act, and no intention contrary to the act can prevail over it; therefore, if the respondent did not maintain an actual residence in the District of Columbia as explained by these instructions for the three years next before his appointment in June, 1913, then his intention to return to the District of Columbia at some indefinite time, if he had such intention, is wholly immaterial, and you will disregard it.

Respondent's Prayers.

No. 1.

The jury are instructed that if they find that the respondent, Newman, more than three years before his nomination as Commissioner, established his residence in the District of Columbia, it is not necessary that he should have remained physically present in said District continuously during the three years next preceding his nomination, provided that his absence from the District of Columbia was for temporarily engaging in business elsewhere and with the intention on the part of said respondent at the time of so absenting himself from the District, of returning when the opportunity presented itself, and that they further find that during his absence the original intention of the respondent continued and he had not claimed residence elsewhere.

No. 2.

The Court further instructs the jury that in determining whether the respondent, Newman, was an actual resident of the District of Columbia for three years next preceding his nomination. they should take due consideration of the character of his residence in said Dis-

trict from March, 1910, to the middle of July, 1911, his in-
88 terest, if any, in public affairs of said District his membership in local public organizations, and other interests in the social and business life of said District.

No. 3.

The jury are further instructed that the law implies and conclusively presumes that every person has a place of actual residence and that a residence once established is presumed to continue until acts are performed evidencing the establishment of a new place of residence, and that if the jury find that the respondent, Newman, established his residence in the District of Columbia more than three years prior to the beginning of his nomination as commissioner, such residence is presumed to have continued; that in determining whether or not the respondent acquired a new residence elsewhere than in the District of Columbia during said period of three years, the jury should consider his declarations *or* intention at or about the time he went to Chicago in the year 1911, his insistence upon an understanding with the person whose employment required his absence from said District that he should be returned to Washington as soon as business permitted; his declarations of intention to return to Washington during the period he was physically absent; the failure, if they so find, to establish a permanent domicile elsewhere and the return *of* him of his family to Washington before his return.

No. 4.

The jury are instructed that it is the duty of the relator, Frizzell, to establish by a preponderance of the evidence that the respondent, Newman, was not an actual resident of the District of Columbia during the three years next preceding his nomination to the office of Commissioner, or had during said period claimed residence elsewhere, or in other words, that the burden of proof of that fact in this case is upon the relator, Frizzell, and by this is meant that unless the jury, in weighing the evidence, is satisfied that a preponderance of such evidence is in favor of the said relator, their verdict shall be for the respondent.

89 No. 5.

The jury are instructed that in considering the evidence in this case, they are required to presume that the official acts of the President of the United States and of the Senate of the United States in nominating and confirming the respondent to the office of Commissioner were regular and proper, and all necessary requirements of law in relation thereto were complied with.

No. 6.

The jury are further instructed that if they find from the evidence the President and Senate of the United States, in nominating and confirming the nomination of the respondent as Commissioner, in-

vestigated the facts with relation to the residence of the respondent in the District of Columbia during the three years preceding his nomination and from the facts so ascertained by them, determined that the said respondent was such resident during said period, or claimed residence elsewhere, then the determination of said fact by the President and Senate, or either, is to be regarded by the jury as evidence that the said respondent was such an actual resident of the District, requiring clear and convincing proof on the part of the relator to contradict, and in considering the weight to be given to said finding or findings as evidence, the jury are entitled to consider what facts offered in evidence before them were considered by the President and Senate, or either, and what, if any, new facts bearing upon the question of such actual residence, have been presented during the present hearing.

No. 7.

The Court instructs the jury that if they find that Oliver P. Newman, the respondent, was, on June 26, 1913, nominated by the President to the Senate as a Civil Commissioner of the District of Columbia; that such nomination was, after investigation into his qualifications by the Senate Committee on the District of Columbia, and favorable report therefrom to the Senate, duly confirmed by the Senate, and that he thereupon entered upon and ever since
90 has filled the duties of such position, then their verdict must be for the respondent.

No. 8.

The Court instructs the jury that if they find that Oliver P. Newman, the respondent, was on June 26, 1913, nominated by the President to the Senate as a Civil Commissioner of the District of Columbia, and that such nomination was duly confirmed by the Senate, and that for three years next preceding such nomination said Oliver P. Newman had been an actual resident of the District of Columbia, not claiming residence elsewhere, then their verdict must be for the respondent.

No. 9.

The Court instructs the jury that to constitute actual resident for three years in the District of Columbia, it is not necessary that said Newman should have been physically present in said District during all of said period, but that if the jury find that he established a domicile therein with the intention of making said District his permanent home more than three years next before his nomination as Commissioner, and only absented himself from the District for temporary purposes, intending at the first available day to return to the District, and did so return as quickly as the opportunity afforded, and that during his absence he never claimed residence elsewhere, but at all times intended to return to the District, then all requirements of actual residence have been met and their verdict must be for the respondent.

No. 10.

The Court instructs the jury that in determining the actual resident of the respondent in the District of Columbia, they should take into consideration his interest, if any they find, in public affairs in the District of Columbia, shortly after his arrival here, his membership in local public organizations, and his identification in any other way with the social and business interests of the District, his declarations of intention at or about the time he went to Chicago, in the year 1911, his insistence then upon a promise that he should, as soon as business permitted, be returned to Washington, his
91 declarations of intention to return to Washington during his absence from Washington, his failure to establish a permanent domicile in any other place, and the return by him of his family to Washington before the return of himself.

No. 11.

The Court instructs the jury that the giving of different business addresses upon the hotel registers is of no evidential weight in this case as to respondent's domicile, nor is the appearance of the respondent's name in a Chicago directory, if the jury find that the same so appeared, without his prior knowledge.

No. 12.

The Court instructs the jury that if they find an actual domicile and residence was established by the respondent in the District of Columbia for over a year prior to July 1911, and that he never thereafter formed an intention to establish any domicile elsewhere, but only absented himself from the District for purposes intended to be temporary, then their verdict must be for the respondent.

No. 13.

The Court instructs that under all the evidence in this case, their verdict must be for the respondent.

(Pending argument upon the prayers, the jury were excused.)

Mr. RALSTON: I have perhaps only a single observation to make with regard to the first of Relator's prayers. I presume that in view of the decision of the Court of Appeals, a decision given some months ago, to which I bow, there is no legal objection. I desire, however, to reserve an objection based upon the fact that I do not think that this is a question proper to go to the jury, and in event this case should by chance reach the Supreme Court of the United States, I would like to have such an objection noted on the record.

The COURT: I will overrule the objection to the prayer
92 and give you an exception, Mr. Ralston, to save the point you now make.

The Court thereupon rejected all the prayers on both sides with the statement that he did not mean to say he would reject all propo-

sitions of law contained in them but that he would embody in his charge those that seemed to him proper, (See Rec. p. 113) to which refusal on the part of the Court as to each of said several prayers of the respondent, the respondent, through his attorney, in open court then and there excepted and objected, which exceptions and objections were severally overruled by the Court to which action by the Court an exception was allowed.

Thereupon Mr. Justice Gould charged the jury as follows:

Gentlemen of the Jury, I possibly ought to state to you at the inception of my charge that what has been said by counsel on both sides in regard to the nature of this case is absolutely true. It is an important case and an unusual case. It deserves your careful, your unprejudiced, and your unbiased consideration. You should approach it with no local feeling. You should dispossess yourselves of all preconceived ideas upon the subject, and pass upon it as you have sworn to, without prejudice and without favor.

A single question is presented for your consideration, which is raised under the following circumstances:

What is called *to* organic act creating a permanent form of government for the District of Columbia, provides for a Commission of three persons, one an officer of the Army, and two civilians. As to the latter the act provides as follows—and I am quoting the language of the act:

"The two persons appointed from civil life, shall, at the time of their appointment, be citizens of the United States and shall have been actual residents of the District of Columbia for three years next before their appointment, and have during that period claimed residence nowhere else."

The petition in this case alleges that the respondent, Oliver P. Newman, one of the present civilian Commissioners of the
93 District, had not, at the time of his appointment, been an actual resident of the District of Columbia for three years next before his appointment. Mr. Newman's return avers that he had been such resident, and the question you are to answer is plainly stated as follows: Had or had not the respondent, Oliver P. Newman, been an actual resident of the District of Columbia for three years next before his said appointment as Commissioner?

The term "resident" as used in this and similar statutes means a settled or fixed abode for an indefinite time. It signifies a person's home, a principal establishment, the center of his interests, to which, whenever he is absent, he has the intention of returning. To reside in a place is to abide or dwell there for a length of time, as contradistinguished from a mere temporary existence in a given locality.

The word "actual," as used in connection with "residence" in the statute under consideration, I understand to require the residence to be more than what is termed a legal or constructive residence. As I, in deciding the law questions in the case, said in your presence, you may better understand what is meant in the law by a legal or constructive residence by an example which is very easy to give because it so frequently occurs. For instance, many of the states

have provisions for registration of voters whereby a man, by complying with certain conditions, becomes a citizen and, under the statute, even a resident of the State, giving him the privileges of citizenship. He may have acquired that privilege by compliance with the law and departed from the state and remained away an indefinite time, with the intention of returning. So long as he maintains that bona fide intention of returning, he is still a resident of the state, but he is not an actual resident. He is what we call a legal or constructive resident. On the other hand, an actual residence, as I shall state more fully is something in addition to the mere legal right which almost might be called domicile, which a man acquires in the way which I have manifested.

I take it that in the passage of the Act in question, the purpose was to require that the civilian Commissioner should, for
94 three years next prior to the appointment, have been a resident of the District in both senses. He should have been a legal resident, in that he might come here with the bona fide intention of becoming a resident, and, when he went away, returning, and also that it requires that he be an actual resident—that is, that for a period of three years be physically present in addition to being what we term a legal resident.

This does not mean that he must have been physically present in the District continuously and at all times for the said period of three years. It is entirely consist*ed* with this construction of the law and this construction of the words "Actual resident" that he might have absented himself from the District during said three years for reasonable periods, either for business or pleasure, provided there existed in his mind the intention to return and continue the District as his actual place of residence, not to make another jurisdiction his residence—that is, his home and abiding place and the center of his activities—to the extent of abandoning his actual residence in this district, and provided also that his absence therefrom was not of such duration and character as to destroy his actual residence in this district. Applying my construction of the term "actual residence" to the testimony in this case, the evidence is undisputed, though it is a question for you to determine of course, that Mr. Newman came here in the month of March, 1910, with the intention of making this his residence, his home, his abiding place, the center of his interests. The fact of his coming is undisputed and the fact of his intention is undisputed. He remained here, taking a part more or less active in the affairs of the city, identifying himself to a reasonable degree with his activities; was employed as an editorial writer upon one of the papers in the city, and in all things, so far as the evidence shows, comported himself as an actual resident of the District of Columbia. He left the city in the middle of July, 1911, as you will remember, for the purpose of going to Chicago under an agreement or contract to enter into newspaper
95 work which led him to many places and which was of a character which might be termed "migratory"—I do not know whether that is disrespectful to the profession or not; but it was a moving assignment to cover news in different parts of

the country, principally connected with pre-convention matters and, after the convention had been held in July, 1912, then covering details in regard to the President-elect and his movements up to the third of March, 1913.

Two questions arise to be determined by you in connection with that admitted departure from the city. They are questions of fact which I leave and should leave to you to be determined. The first is, when Mr. Newman left in the middle of July, 1911, did he leave with the intention of returning to this as his home? Did he go away with the idea that when he completed the work which he had agreed to perform, he would come back to this as his abiding place?

In reaching a conclusion upon that point you should give due weight to the testimony of the witnesses as to his declarations made at the time, that he did intend to return; also as to his own statements that in the negotiations which he had with the man who employed him in the newspaper work, it was provided that he should have the right to return upon the completion of his work to the city of Washington and his home.

But these statements are not conclusive. You should take into consideration all the evidence upon this intention to return, namely, what he did in Chicago, the manner in which he lived there, his activities, his name appearing in the city directory, which, while he said he was not responsible for it, is an evidentiary fact of some importance, though not great, to my mind. I also give little weight, and I think you should give little weight, to the mere question of registration in the hotel registers from different cities. It is a fact to be considered, but I think entitled to very little wieght in determining his intention to return.

If you find that he had the intention to return, if he had established this bona fide residence here, and when he went away intended to return, then, so far as that point is concerned in reference to his absence, he would be entitled still to be considered
96 a citizen of the District of Columbia, a resident of the District of Columbia.

But in addition to that, because of the use of this word "actual" in connection with "residence" there is a further point which I think you must determine. While I have stated to you it is proper for a man who is an actual resident of a city to leave the city for business or pleasure for reasonable periods, it is possible that a man may leave for such a period as will destroy his right to be entitled to be considered as actual resident. The question for you also to determine is, was Mr. Newman's absence from the city, from the middle of July, 1911, to either November, 1912, or March, 1913, such an unreasonable absence from the city, under all the circumstances of the case, as to indicate to your mind abandonment of his actual residence here to the extent that he has not the right to be deemed to have been an actual resident for three years prior to his appointment. In other words, was the character of his absence, its duration and the nature of the work which he performed in his absence, such as in your mind to be inconsistent with the idea of an

actual residence during the period in which he was absent from the city. I say I leave these two questions to you—his intention of returning when he left, and the duration and character of his business as determining the question whether he is entitled to consider the period of his absence as a part of the three years prior residence required of him under the law.

As a matter of law the burden of proof is upon the relator in this case to establish to your satisfaction that during the three years prior to his appointment Mr. Newman had not been an actual resident of the District; and unless you are satisfied by a preponderance of the evidence that he had not so been, under the law as I have laid it down to you the verdict should be in his favor.

If you find that Mr. Newman has not been an actual resident of the District of Columbia within the rules I have laid down to you, for three years next prior to his appointment, the form of your verdict should be that "the defendant is guilty of the act of usurping the office of Commissioner of the District of Columbia."

97 If you find he has been such actual resident for the three years prior to his appointment, the form of your verdict should be that he "is not guilty of the act of usurping the office of Commissioner of the District of Columbia."

You may take the case.

The COURT: I will ask the stenographer to make this entry on behalf of counsel on both sides, so there may be no misunderstanding: I have refused to grant every instruction asked by either side. To my refusal to grant the instructions and each one of them specifically, an exception is taken by each side, which is granted by the Court.

Thereafter the jury returned a verdict in behalf of the petitioner, finding the respondent guilty as charged.

The foregoing exceptions were duly noted and allowed by the Court at the trial, and at the request of counsel for the respondent, this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

Witness my hand and seal this 31st day of August, A. D. 1914.

ASHLEY M. GOULD, [SEAL.]
Justice of the Supreme Court
of the District of Columbia.

Settled by consent.

A. A. BIRNEY,
of Counsel for Appellee.

98 [Endorsed:] Law No. 56,157. U. S. ex Rel. Wm. J. Frizzell vs. Oliver P. Newman. Bill of Exceptions. Law Offices of Ralston, Siddons & Richardson, Union Savings Bank Building, Washington, D. C. J. H. Ralston, F. L. Siddons, W. E. Richardson, H. T. Winfield, S. D. Willis, A. B. Baker.

Endorsed on cover: District of Columbia Supreme Court. No. 2741. Oliver P. Newman, Appellant, vs. United States of America ex Rel. William J. Frizzell. Court of Appeals, District of Columbia. Filed Sep. 1, 1914. Henry W. Hodges, Clerk.

8—2741

TUESDAY, December 8th, A. D. 1914.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

The argument in the above entitled cause was commenced by Mr. J. H. Ralston, attorney for the appellant, and was continued by Messrs. A. A. Birney and J. W. Bailey, attorneys for the appellee, and was concluded by Mr. J. H. Ralston, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL, Appellee.

This is an action in quo warranto brought by relator, William J. Frizzell, a citizen and taxpayer, challenging the right of respondent, Oliver P. Newman, to hold the office of Civil Commissioner of the District of Columbia.

The petition sets forth that, by the Act of Congress of June 11, 1878, providing a permanent form of Government for the District of Columbia, the President, by and with the advice and consent of the Senate, was authorized to appoint two persons from civil life, who, with an officer of the corps of engineers of the United States army, should be Commissioners of the District of Columbia. The Act provided that "the two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else."

It is further alleged that on June 26, 1913, the President appointed respondent Newman to the office of Civil Commissioner; that he was thereafter confirmed by the Senate, and that, on July 19, 1913, he took the prescribed oath and entered upon the duties of his office, which he has since held. It is alleged that respondent was not qualified in law to receive such appointment; that he has unlawfully assumed and usurped the said office, and is not lawfully entitled to exercise the functions and enjoy the emoluments thereof; that, at the time of his appointment to said office, he had not been an actual resident of the District of Columbia for three years prior to his appointment, and that, before his appointment, he had claimed residence at Chicago, Illinois, and at Princeton, New Jersey.

On this petition, a writ was issued requiring respondent to show

by what warrant he claimed the right to hold the office of Commissioner of the District of Columbia. A demurrer and motion to quash were filed, which were sustained, and the petition dismissed. From this an appeal was taken by relator to this Court, and the judgment of the Court below was reversed. United States ex rel. Frizzell vs. Newman, 42 App. D. C., 78. The cause was remanded to the Supreme Court of the District of Columbia, and came on for trial before a jury. A verdict was returned finding defendant guilty of the act of usurping the office of Commissioner. A motion for new trial was filed and overruled. Motions in arrest of judgment and for judgment non obstante veredicto were filed by respondent and denied by the Court. The judgment of ouster wes entered, from which this appeal was taken.

It appears from the evidence that respondent first came to Washington in July, 1901, remaining here until 1902, when he went to New Mexico on account of ill health, where he remained until April, 1904. He resided in different cities of the country until March, 1910, when he returned to Washington and entered the employ of the Washington Times. With his family he took apartments at the Kenesaw Apartment, where he remained during the summer of 1910, removing in the fall to the Westminster Apartment, where he resided until July, 1911, when, with his family, he removed to Chicago. It appears that he entered into the employment of the newspaper Enterprise Association to perform newspaper work in Chicago in connection with the approaching presidential campaign, with the understanding, according to his own testimony, that, when his work was completed in Chicago, he should be returned to Washington. No time seems to have been fixed for completion of the work in Chicago.

Respondent testified that, while he resided in Chicago, "his household consisted of really two families, witness's wife, boy and himself, and wife's father and mother, all occupying the same dwelling. Took a furnished apartment, having no household furniture at all. Sent the boy to the public school, in Chicago, recollection is that the mother entered him. Recalled going with her one day to see one of the Assistant Superintendents about which school he should enter, but recollection is that was the only information he had about it. * * * They lived first in a furnished flat; then a little family hotel; then a boarding house; then a furnished flat in Evanston." It further appears from his own testimony that he never registered or voted in Chicago. His name and address appeared in the city directory of Chicago for the year 1912. He, however, testified that he did not know his name was in the directory until after he returned to Washington. While in Chicago, he was engaged in newspaper work, and traveled about considerably, usually registering at hotels from that city, but never registering, as far as the record shows, from Washington.

In November, 1912, immediately following the presidential election, his family returned to Washington, and again took apartments at the Westminster. No place of residence had been retained by respondent in Washington during his absence, nor had he left any

property or belongings here or paid any taxes. Respondent spent the winter of 1912 and 1913 at Princeton and Sea Girt, New Jersey, with President-elect Wilson. He came to Washington to attend the inauguration of the President in March, 1913, when he joined his family at the Westminster, and has remained here since that date. He testified that he regarded Washington as his home, and at all times intended to return here as soon as his engagements in Chicago permitted. A number of witnesses testified to respondent's having expressed this intention to them.

The matters disposed of in our former opinion are again advanced in this appeal. They will not be reconsidered, but we will confine ourselves to the new questions presented. Exception was taken to the ruling of the court in refusing to admit in evidence a transcript of the testimony taken before the Committee of the Senate while it had under consideration the confirmation of the President's nomination of respondent to the office in question. This evidence was incompetent, and could have no relevancy to the present issue, which involves respondent's right to hold the office, and not the motives which prompted the President and the Senate in making the appointment. Besides, it is not quite clear in what respect respondent can claim injury from this ruling. The transcript offered contains, so far as it goes, the same testimony given by respondent in this case. It merely would have duplicated a portion of the evidence submitted to the jury, to no purpose except to encumber the record.

It is urged by counsel for respondent that the court erred in granting relator the right to open and close in the submission of the evidence and the right to open and close the argument to the jury. The court properly instructed the jury that the burden of proof was upon relator. Mere possession of the office, accompanied by a commission from the proper appointing power, created a presumption that relator possessed the legal qualifications to hold the office. The affirmative was, therefore, cast upon relator of overcoming this presumption, which, under our practice, required him to open and close the evidence and the argument. It is difficult, however, to understand just how respondent could be damaged by having the burden cast upon relator.

The form of the writ would seem to indicate that the burden is upon respondent to show his lawful possession of the office. This was the early English practice, where the writ was prerogative, and issued in the name of the King. But that practice has not been followed in this country. Here, the writ has fallen into disuse, and the proceeding is initiated by information in the nature of a civil proceeding to try the right to office. In State ex rel. Danforth et al. vs. Hunton et al., 28 Vt., 594, the court, considering the question of practice in quo warranto, said: "The form of the issue, requiring the defendants to show cause, would seem to indicate, in form, that the defendants would be required to go forward in the case. But it seems to us that the form of the issue in the case does not correctly define the true position of the parties, in regard to the presumption of right. The defendants are in possession

of the office in question, and should be presumed regularly elected and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument." In State ex rel. Bornefeld vs. Kupferle, 44 Mo., 154, the court held an information in the nature of a writ in quo warranto to be a civil proceeding casting the burden upon the relator to remove the presumption which exists in favor of the regularity of respondent's appointment and his right to hold the office. It was not error to require relator to go forward in the trial.

Respondent objected to the submission to the jury of evidence relative to his registering at hotels from Chicago, and in one or two instances from Princeton, New Jersey. The object of registering in hotels is to advise the hotel management of the present address of the guest, where, if necessary, he can be reached speedily, and it may, or may not, indicate his domicil or legal residence; but in all cases it should indicate his real or actual present residence. Hence, as a fact showing actual residence, if it appears that the address given corresponds to the alleged actual place of abode of the party, it is certainly competent as tending to establish that fact. In submitting this evidence, the court instructed the jury: "You should take into consideration all the evidence on this intention to return, namely, what he did in Chicago, the manner in which he lived there, his activities, his name appearing in the city directory, which, while he said he was not responsible for it, is an evidentiary fact of some importance, though not great, to my mind. I also give little weight, and I think you should give little weight, to the mere question of registration in the hotel registers from different cities. It is a fact to be considered, but I think entitled to very little weight in determining his intention to return." We agree with the court below that the evidence had little or no importance in determining the intention of relator to return, but its effect would be different on the question of actual residence. Respondent, however, is not in position to complain of this instruction, since no objection was interposed to the admission of the evidence upon which the instruction was based. Being before the jury without objection or exception, the court disposed of the evidence in a much less prejudicial manner to respondent than was possible under the view we entertain of its competency and relevancy to the principal issue in the case.

A more difficult question is presented in the refusal of the Court to instruct a verdict for respondent. Counsel for respondent requested an instruction to this effect at the conclusion of relator's testimony, and renewed it when the evidence in full was concluded. Exception to the ruling of the court was taken, and this presents the chief question in the case. It goes directly to the right of respondent to hold the office to which he has been appointed. The proposition is squarely presented, whether or not respondent was an actual resident of the District of Columbia for three years prior to his appointment. It involves the difficult task of drawing the distinction

(if, indeed, it can be done from the confusion of opinion) between domicil and residence.

The most accurate definition of domicil to which our attention has been called in contained in Mitchell vs. United States, 21 Wall., 350, where the Court approves the definition from Cuyer vs. Daniel, 1 Binney, 349, in which it is defined as "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." The Court then defines it more elaborately, as follows: "By the term domicil, in its ordinary acceptation, is meant the place where a person lives and has his home. The place where a person lives is taken to be his domicil until facts adduced establish the contrary. * * * A domicil once acquired is presumed to continue until it is shown to have been changed. Where a change of domicil is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicil two things are indispensible: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicil for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

It will be observed that to establish a domicil two things are indispensible,—residence; and the intention to remain permanently at the place where residence is established. It logically follows, however, that there may be a residence without the intention of establishing a domicil; but, without the intention, in conjunction with the residence, there is no domicil. And when a domicil is thus established, mere absence from it will not effect a change. There must exist the intention before a change can be effected. In other words, residence may exist without establishing a domicil, but domicil cannot be established without residence. Residence may be separated from the domicil, and the domicil still remain. But where the retention of domicil depends exclusively upon the intention to return at some indefinite time and resume residence, we think such intention must be evidenced by something more than a mere mental concept: it must be coupled with some outward manifestation indicative of a fixed purpose. In other words, a mere floating intention to return is not sufficient to retain domicil. "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period." Story on Conflict of Laws, sec. 46. See also Bradstreet vs. Bradstreet, 18 D. C., 229; Ringgold vs. Bailey, 5 Md., 186.

Where a person moves from his domicil and leaves nothing behind indicating an intention to return, and establishes a fixed place of abode for himself and family in the new place of residence, it creates a presumption of change of domicil. The rule is stated in Ennis et al. vs. Smith et al., 14 How., 399, 422, as follows: "But what

amount of proof is necessary to change a domicil of origin into a prima facie domicil of choice? It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice, the burden of disproving it. Where a person lives, is taken prima facie to be his domicil, until other facts establish the contrary."

The word "residence", like "domicil", is frequently used to express different meanings according to the subject-matter. For example, the term "residence" is construed to mean "domicil" in determining jurisdiction in divorce proceedings. Atherton vs. Atherton, 181 U. S., 155; Haddock vs. Haddock, 201 U. S., 562; Thompson vs. Thompson, 35 App., D. C., 14; 226 U. S., 561; Shaw vs. Shaw, 98 Mass., 158. Or in ascertaining the voting residence of a citizen. Silvey vs. Lindsey, 107 N. Y., 55; Crawford vs. Wilson, 4 Barb., 505; Thomas vs. Warner, 83 Md., 14; Fry's Election Cases, 71 Pa. St., 302; Vanderpoel vs. O'Hanlon, 53 Iowa, 246; Blanchard vs. Stearns, 5 Metc., 298. Or in probate and administration. Kennedy vs. Ryall, 67 N. Y., 379; Isham vs. Gibbons, 1 Bradf., 69. And generally in relation to taxation.

. Aside from the exceptions above cited, residence and domicil are not generally regarded as synonymous. In the case of Penfield vs. Chesapeake etc. R. Co., 134 U. S., 351, the Court construed a statute of New York which provided that, "Where a cause of action * * * accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases: * * * 2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was, or became, a resident of the State." It was held that the statute contemplated that a person to come within its provisions should be an actual resident in the State. Penfield was originally a resident of New York State, but had been absent from the State for several years. At the time in question, he was a resident of Missouri, but had sent his wife and family to Brooklyn, and established them in a house there. He remained in St. Louis for business reasons, intending later to join his family in New York. His right to bring the action depended upon whether the establishment of his family in New York made him a resident of that State within the Statute. The Court held, following a long line of decisions of the New York courts, that, though he had resided in New York prior to going to Missouri, he was not entitled to bring the action, in that he was not at the time an actual resident of New York. Distinguishing between domicil and residence, the court said: "Assuming, without deciding, that the testimony introduced for the plaintiff in the present case would warrant the impression that he had obtained a domicil in the State of New York by virtue of his wife and family, with his consent, having made their home in that State, there is nothing in the evidence which had the slightest tendency to show that his own actual resi-

dence was in the State of New York for many years prior to his going there from St. Louis in December, 1883." The opinion in this case is elaborate, and cites with approval many cases where the distinction between domicil and residence is made.

We think that, by the great weight of authority, there is a well defined distinction between residence and domicil. In the case of Long vs. Ryan, 30 Gratt., 718, the court, considering this distinction. said: "There is, however, a wide distinction between domicil and residence, recognized by the most approved authorities everywhere. Domicil is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicil, two things must concur—first, residence; secondly, the intention to remain there. Pilson, Trustee, vs. Bushong, 29 Gratt., 229; Mitchell vs. United States, 21 Wall., 350. Domicil, therefore, means more than residence. A man may be a resident of a particular locality without having his domicil there. He can have but one domicil at one and the same time, at least for the same purpose, although he may have several residences. According to the most approved writers and lexicographers, residence is defined to be the place of abode, a dwelling, a habitation, the act of abiding or dwelling in the place for some continuance of time. To reside in a place is to abide, to sojourn, to dwell there permanently or for a length of time. It is to have a permanent abode for the time being, as contradistinguished from a mere temporary locality of existence. In the Matter of Wrigby, 8 Wend., 134, 140; 1 Amer. Lead. Cases, 899, 953."

Residence, as distinguished from domicil, legal or constructive residence, implies a place of abode. Residence "imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there." In re Collins, 64 How. Pr., 63. It also "imports a personal presence, whereas, one may have a domicil in a place from which he is absent most of the time." The Chinese Tax Cases, 14 Fed., 338. "Literally, a resident is one who sits, abides, inhabits or dwells in a certain place." Collinson vs. Teal, 4 Sawy., 241. Or a resident is "One dwelling or having his abode in any place; an inhabitant, one that resides in a place." Roosevelt vs. Kellogg, 20 Johns., 208.

The most that is claimed for respondent is that, more than three years prior to his appointment, he had established a domicil in Washington, to which he intended to return on completion of his engagement in Chicago. On the evidence of his intention to return, the jury found against him; but, assuming that he had such intention, it can avail him little in the light of the authorities cited. The residence he had established here he separated from the domicil and carried with him to Chicago. No residence remained during his absence, for he left no place of abode in Washington. His intention to return could be said, at most, to have held the domicil, and, perhaps, legal residence, here, while he was, in fact, residing in Chicago. Before leaving Washington, his domicil and his residence

had been the same, and, therefore, they may be said to have been synonymous terms. After leaving, his domicil and his residence were not the same. The situation had changed. The terms could no longer be said to be synonymous. His domicil was in Washington; his residence in Chicago. All that was necessary to transfer the domicil to Chicago would have been his intention to permanently remain there. That intention, in conjunction with the residence already established there, would have transferred the domicil to Chicago, and again the terms would have become synonymous; or the transfer of the residence back to Washington in November, 1912, or March, 1913, coupled with the intention to remain here, would have accomplished the same result. But it is apparent that, during the residence in Chicago, there was no residence in Washington in the sense of a real place of abode.

We conclude, therefore that a person may have a domicil in one place and live and abide in another, and, while his domicil in that instance may be called his constructive or legal residence, it is not, in fact, his place of abode. Of course, residence, domicil, legal and constructive residence may all be in the same place—the real place of abode; and that, we think, is the sort of residence Congress had in mind when it embodied in the statute the requirement of actual residence as a qualification for appointment to the office of Civil Commissioner.

The court submitted to the jury by proper instructions the question of whether or not respondent, when he removed from Washington to Chicago had an intention to return to Washington. In summing up on this branch of the case, the court instructed the jury, as follows: "If you find that he had the intention to return, if he had established this bona fide residence here, and when he went away intended to return, then, so far as that point is concerned in reference to his absence, he would be entitled still to be considered a citizen of the District of Columbia, a resident of the District of Columbia." The court then instructed the jury that they would also have to determine whether or not, during the period of respondent's absence, he retained an actual residence in Washington, as required by the statute. This branch of the case was summed up in the following instruction: "If you find that Mr. Newman has not been an actual resident of the District of Columbia within the rules I have laid down to you for three years next prior to his appointment, the form of your verdict would be that 'the defendant is guilty of the act of usurping the office of Commissioner of the District of Columbia.' If you find he has been such actual resident for the three years prior to his appointment, the form of your verdict should be that he 'is not guilty of the act of usurping the office of Commissioners of the District of Columbia.'" The jury found against respondent generally, or, at least, that he had not been an actual resident of the District of Columbia for three years prior to his appointment. Reducing the verdict to a finding on the question of actual residence alone, respondent's intention to return becomes unimportant, except in so far as it affects actual residence.

The general terms "residence" and "domicil" are of little impor-

tance here, since Congress has used the restricted term "actual resident." While there are authorities holding that residence and domicil are regarded as synonymous terms, our attention has been directed to no case where the terms "actual residence" and "domicil," when referring to different locations, were held to be synonymous. The statute imposes two limitations upon the appointing power in the selection of Civil Commissioners—first, a person to possess the legal qualifications for appointment shall have been an actual resident of the District for three years preceding his appointment, and, second, he shall not have claimed residence elsewhere. The restricted term "actual resident" is used to define his qualification, and the general limitation, "shall have, during that period, claimed residence nowhere else," to define his qualification. It follows that, though a person may have been an actual resident of the District for three years preceding his appointment, but claimed residence or domicil or legal residence outside of the District, he falls within the disqualifying clause of the statute. The converse must also be true that, if he merely claimed a domicil or legal residence in the District during the required period, and, during the period, or a portion thereof, maintained an actual residence or place of abode outside of the District, made necessary, as in this instance, by business engagements at such place of abode, he cannot measure up to the qualifications required by the statute. Assuming that respondent did not claim residence elsewhere, there still remains the statutory requirement that he shall have actually resided in the District of Columbia for three years prior to his appointment.

The word "actual" is defined as "something real, in opposition to constructive or speculative, something existing in act." Bouvier's Law Dictionary, Vol. 1, p. 89. It is also defined as, "Real, present, visible, existant, existing in act." Corpus Juris, Vol. 1, 1182, and cases cited. Applying these definitions to the term "actual resident" used in the statute, it means that a person, to meet the requirement, must be a resident, residing in fact within the District, and not residing therein merely in contemplation of law.

In Tipton vs. Tipton, 87 Ky., 243, the statute under consideration provided: "The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce—1. A residence in this State for one year next before the commencement of the action." The court construed this statute to require an actual residence within the State, and speaking of the difference between legal and actual residence, said: "As contradistinguished from his legal residence, he may have an actual residence in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantive. He may not actually abide at his legal residence at all; but his actual residence must be his abiding place."

In Fitzgerald vs. Arel, 63 Iowa, 104, the court was considering the construction of a statute which provided that in certain cases justices of the peace should not have jurisdiction over actual residents of another county. Distinguishing between an actual and a legal resi-

dent, the court said: "Proceeding, then, without inquiry, we have to say that it does not necessarily follow that the defendant was an actual resident of Des Moines county because his domicil was in that county. Residence and domicil are not necessarily the same. 2 Kent's Com., 431, note; Love vs. Cherry, 24 Iowa, 204; Cohen vs. Daniel, 25 Id., 88. In the latter case, Beck, justice, said: 'The distinction between the import of the terms residence and domicil is obvious. The first is used to indicate the place of dwelling, whether permanent or temporary; the second, to denote a fixed, permanent residence to which, when absent, one has the intention of returning.' The distinction here noted is the same as is sometimes made between actual residence and legal residence or inhabitancy. In Crawford vs. Wilson, 4 Barb., 522, the court said: 'The actual residence is not always the legal residence or inhabitancy of a man. A foreign minister actually resides, and is personally present, at the court to which he is accredited, but his legal residence or inhabitancy and domicil are in his own country.' See also, in this connection, Shelton vs. Tiffin, 6 How., 185, and 2 Parsons on Cont., 578. In our opinion, whenever a man buys or hires a house and sets up housekeeping with his family, with the design of remaining there until he has completed a certain job of work, he becomes an actual resident of that county within the meaning of the statute in question, and that, too, notwithstanding his domicil may be in another county, to which he intends to return upon the completion of the job."

In Lawson vs. Adlard, 46 Minn., 243, Adlard, residing and domiciled in Minnesota, moved with his family into South Dakota, where he had engaged to do certain Government work, which required fourteen months for its performance. The family residence was left behind with a portion of the household effects locked in it. A tenant occupied the first story of the house for six months. Adlard and members of his family returned occasionally for the night or for a short stay during the day. He, however, had rented a house in which they lived in South Dakota. In sustaining a writ of attachment against Adlard, issued on the ground of non-residence, the court held that, while his domicil and legal residence still remained in Minnesota, his actual residence was in South Dakota. "It was the abiding place, the home of the family." In other words, it was his real abode, his residence in act and in fact, as distinguished from his constructive or legal residence or domicil in Minnesota. Actual residence, therefore, may be defined as a person's present place of abode, where he, in fact and in act, lives; his home, where he has a real, and not a constructive existence.

While each case must be decided largely upon its own merits, considering the statutory requirements and the facts attending the particular case, our attention has been called to no statute prescribing the qualifications of a person for appointment or election to an office where the restrictions are so great as here. It requires not merely a residence, which it might be contended means only a domicil, a legal or a constructive residence, but it requires actual residence. Every reason exists for this restrictive statute. As to most officers

in the District, there is no such limitation placed upon the appointing power; they may be selected from the country at large; but the Commissioners are the chief executive and administrative officers of the District, and they also legislate for the District in those matters specially delegated by Congress. It was, therefore, important to provide some limitation upon the appointing power which would insure the selection of men for this position who had resided in the District long enough to become acquainted with its needs and affairs. To what does the contention of respondent logically lead? If actual residence means mere domicil or legal residence established by sixteen months' habitation in Washington, continued thereafter for a lapse of sixteen or twenty months by the mere intention of the party to return, the same mental concept might hold domicil or legal residence for three, ten or thirty years; for time in retaining domicil, so long as the intention to return exists, is not material. This would defeat the evident intent of Congress. It would foist upon the people of the District a person totally unacquainted with its affairs. If the will of Congress is to be thus ignored, better appoint a person coming under the second limitation of the statute, who had actually resided here for three, ten or thirty years, but who had claimed residence elsewhere. In the latter violation, the public good, at least, would be better subserved.

Congress must be imputed with knowledge of the fact that Washington is at all times inhabited by a large population who maintain their legal residences or domicils in the States from which they respectively came. This is true largely of the vast army of Federal officer holders. We think the intent of Congress, therefore, to be that a person appointed to the office of Civil Commissioner shall have, for three years, at least, prior to his appointment, lived and had his home within the District. Of course, this would not restrain him from leaving the District temporarily on business or pleasure; but he must have at all times a fixed abiding place to which he returns, and which is, in fact, his home.

It will be observed that, in considering the law of the case, we have conceded to respondent all that the evidence, in its most favorable aspect, implies. The issues of fact, however, were submitted to the jury by ample instructions. It was left to the jury to determine from the evidence whether or not respondent, when he left Washington to go to Chicago, had a definite intention to return. In determining this fact, the jury had before it evidence from the lips of respondent that no place of abode was left behind; what he did toward establishing a fixed place of abode in Chicago; the character of work in which he was engaged; the fact that prior to coming to Washington in 1911 he had not remained in one place for any great length of time, and the circumstances attending his residence in Chicago. It was also left for the jury to determine from the evidence whether respondent retained such an actual residence in Washington during the entire three years prior to his appointment as would meet the requirements of the law as given it by the court. The verdict was against respondent. Hence, upon the issues of fact and the reason-

able inferences to be drawn therefrom, it is conclusive so far as this Court is concerned.

The judgment is affirmed with costs.

JOSIAH A. VAN ORSDEL,
Associate Justice.

Mr. Chief Justice Shepard dissenting.

(Endorsed:) No. 2741. Oliver P. Newman, appellant, vs. United States ex rel. William J. Frizzell. Opinion of the Court per Mr. Justice Van Orsdel. Court of Appeals, District of Columbia. Filed Jan. 4, 1915. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
U. S. ex Rel. WILLIAM J. FRIZZELL.

Dissenting Opinion by Mr. Chief Justice Shepard.

I am compelled to dissent from the judgment affirming this cause. The evidence plainly shows that Oliver P. Newman established his home or residence in the City of Washington in March, 1910, occupying an apartment with his family until July, 1911. He owned no dwelling house in the City, but his intention was to make Washington his permanent residence. He was a newspaper reporter and correspondent and in July, 1911, was employed by a newspaper union to travel the country in its service, with headquarters at Chicago.

When employed, it was in the contract that he should, on finishing the Chicago work, be given employment by the same company in Washington. Before accepting the Chicago employment he expressed his intention to several persons who were interested in him, to return to Washington and retain his permanent residence there.

During his absence he was accustomed to travel in the Western States doing work for the newspaper union. He was at Baltimore during the Democratic Nominating Convention and was afterwards assigned to Princeton and Seagirt where the Democratic nominee resided.

November 15, 1912, he sent his family to Washington and went to Bermuda with the President-elect, who took a vacation there. He remained with the President-elect until March 4th, when he came to the Shoreham Hotel, taking an apartment assigned to him there by his employer.

Immediately after the Inauguration he went to Chicago closing up his affairs there, and then the agreement by which he was to return to Washington was carried out. He returned, and with his

family, has remained here since. He never intended to take up a permanent residence in Chicago, or Princeton, or Seagirt.

This original location in Washington constituted his residence or home and his intention to remain there permanently was fixed. Dicy on his admirable treatise on the "Conflict of Laws", page 61, says "As a home is acquired by the combination of actual residence (factum) and intention of residence (animus) so it is, when once acquired, lost or abandoned only when both the residence and the intention to reside cease to exist."

He again says, on page 111: "If the intention permanently to reside in a place exists a residence in pursuance of that intention, however short, will establish a domicile."

This doctrine, that actual residence, however short, with intention of remaining permanently, is the test of residence according to all the authorities. See Mitchell vs. United States, 21 Wall. 351, 353. Here it is said "A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensible; First, residence in the new locality; and second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

The requirement of actual residence in the city does not add anything new. It surely could not have been intended by actual residence that a person should acquire a home in the District of Columbia and remain in the District continuously until the expiration of the three years.

It is conceded that a person making his home in the District may be permitted to leave the District during the three years. It ought to make no difference that a person taking up his residence has not acquired an actual dwelling house but instead is compelled to establish himself in an apartment. The actual residence, when once acquired with the intention to remain, is all that is necessary.

The court, in my opinion, should have instructed the jury to return a verdict for the defendant. Wherefore I believe the judgment should have been reversed.

MONDAY, January 4th, A. D. 1915.

No. 2741, January Term, 1915.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL,
January 4, 1915.

Mr. Chief Justice Shepard dissenting.

In the Court of Appeals of the District of Columbia.

No. 2741.

OLIVER P. NEWMAN
vs.
WILLIAM J. FRIZZELL.

Petition of Oliver P. Newman for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Court of Appeals of the District of Columbia:

The petition of Oliver P. Newman, defendant in the above entitled cause, respectfully shows that on the 4th day of January, 1915, the Court of Appeals of the District of Columbia entered a final judgment against your petitioner in a certain cause originally entitled, "United States of America, ex rel. William J. Frizzell, vs. Oliver P. Newman, Respondent", wherein your petitioner as defendant and respondent was charged, by petition for quo warranto, as having unlawfully assumed and usurped the office of Civil Commissioner of the District of Columbia.

To the original petition for quo warranto, the respondent appeared and demurred and also moved to dismiss for reasons fully set forth in the record, which demurrer and motion to dismiss were sustained by the trial judge of the Supreme Court of the District of Columbia, but on appeal to the Court of Appeals of the District of Columbia, his judgment and action were reversed and the cause remanded to the Supreme Court of the District of Columbia for trial; that upon said trial, the respondent entered pleas of not guilty and other pleas appropriate to the then condition of the case, and the cause went to trial before a jury; that the result of such trial was

a verdict and judgment against this petitioner, ousting him from his said office; that he thereupon appealed to the Court of Appeals of the District of Columbia, giving a supersedeas bond which was duly approved, and that said judgment was as before stated, on January 4, 1915, confirmed by a majority of the Court of Appeals of the District of Columbia.

That in its said judgment, the majority of the said Court of Appeals erred and said proceedings were erroneous in the respects shown by the Assignment of Error filed herewith and particularly among other things in that—

Jurisdictional Errors of Various Kinds.

1. They failed to limit the right to bring quo warranto proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

2. They recognized the right of an assistant United States District Attorney in the absence of the United States District Attorney, and without instructions from him to grant or refuse permission to bring quo warranto proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and tax payer in the District of Columbia as an interested person within the meaning of the Statute governing quo warranto, and therefore, to bring such proceedings, the Attorney General and an Assistant District Attorney having refused to bring them.

4. They recognized the right of a Judge and jury to revise and reverse the findings of the President and Senate upon a question of fact governing qualifications of an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a thorough examination into his qualifications and a determination that he was qualified under the law.

Evidential and Other Objections.

6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statement in substance of the facts as he had narrated to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge in not instructing the jury in effect that they were required to presume that the official acts of the President and of the Senate in nominating and confirming Respondent to the office of Commissioner were regular and proper and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury in effect that the President and Senate having found the necessary residence, such finding could only be overcome by convincing proof.

10. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

11. In not reversing the action of the trial court in overruling the motions for judgment non obstante veredicto and in arrest of judgment.

And your petitioner claims the right to remove the said cause to the Supreme Court of the United States by writ of error by virtue of the Judicial Code of the United States, Section 250, a writ of error or appeal being allowed from the Court of Appeals of the District of Columbia to the Supreme Court of the United States in the following cases:

"First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

Wherefore, Your petitioner prays the allowance of a writ of error returnable to the Supreme Court of the United States at Washington, District of Columbia, for the correction of the errors complained of and for supersedeas, and that a duly authenticated transcript of record, proceedings and papers herein be sent to the United States Supreme Court.

Dated at Washington, D. C. January 11, A. D. 1915.

OLIVER P. NEWMAN,
By J. H. RALSTON,
W. E. RICHARDSON,
G. W. HOTT,
Attorneys.

JOHN W. DAVIS,
Of Counsel.

In the Court of Appeals of the District of Columbia.

No. 2741.

OLIVER P. NEWMAN
vs.
WILLIAM J. FRIZZELL.

Assignments of Error.

Now comes Oliver P. Newman, plaintiff in error and respectfully submits that in the records, proceedings, decision and final judgment of the Court of Appeals, there is manifest error, to wit:

Jurisdictional Errors of Various Kinds.

1. They failed to limit the right to bring quo warranto proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

2. They recognized the right of an Assistant United States District Attorney in the absence of the United States District Attorney, and without instructions from him to grant or refuse permission to bring quo warranto proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and tax payer in the District of Columbia as an interested person within the meaning of the Statute governing quo warranto and, therefore, to bring such proceedings, the Attorney General and an assistant District Attorney having refused to bring them.

4. They recognized the right of a Judge and jury to revise and reverse the findings of the President and Senate upon a question of fact governing qualifications of an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a thorough examination into his qualifications and a determination that he was qualified under the law.

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6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statement in substance of the facts as he had narrated to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge in not instructing the jury in effect that they were required to presume that the official acts of the President and of the Senate in nominating and confirming respondent to the office of Commissioner were regular and proper and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury in effect that the President and Senate having found the necessary residence, such finding could only be overcome by convincing proof.

10. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

11. In not reversing the action of the trial court in overruling

the motions for judgment non obstante veredicto and in arrest of judgment.

OLIVER P. NEWMAN,
By J. H. RALSTON,
W. E. RICHARDSON,
G. W. HOTT,
Attorneys.

JOHN W. DAVIS,
Of Counsel.

(Endorsed:) No. 2741. Oliver P. Newman vs. William J. Frizzell. Petition of Oliver P. Newman for Writ of Error and Assignments of Error. Court of Appeals, District of Columbia. Filed Jan. 11, 1915. Henry W. Hodges, Clerk.

MONDAY, January 11th, A. D. 1915.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

The petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States was submitted to the consideration of the Court by Mr. J. H. Ralston of counsel for the appellant in support of petition.

FRIDAY, January 15th, A. D. 1915.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said petition be, and the same is hereby, denied.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

On Motion of Mr. J. H. Ralston, of counsel for the appellant, It is ordered by the Court that the mandate in the above entitled cause be, and the same is hereby stayed until February 1, 1915.

In the Supreme Court of the United States, October Term, 1914.

No. —.

OLIVER P. NEWMAN
vs.
WILLIAM J. FRIZZELL.

Petition of Oliver P. Newman for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Unted States:

The petition of Oliver P. Newman, defendant in the above entitled cause, respectfully shows that on the 4th day of January, 1915, the Court of Appeals of the District of Columbia entered a final judgment against your petitioner in a certain cause originally entitled, "United States of America ex rel. William J. Frizzell vs. Oliver P. Newman, Respondent," wherein your petition- as defendant and respondent was charged, by petition for quo warranto, as having unlawfully assumed and usurped the office of civil commissioner of the District of Columbia.

To the original petition for quo warranto, the respondent appeared and demurred and also moved to dismiss for reasons fully set forth in the record, which demurrer and motion to dismiss were sustained by the trial Judge of the Supreme Court of the District of Columbia, but on appeal to the Court of Appeals of the District of Columbia, his judgment and action were reversed and the cause remanded to the Supreme Court of the District of Columbia for trial; that upon said trial, the respondent entered pleas of not guilty and other pleas appropriate to the then condition of the case, and the cause went to trial before a jury; that the result of such trial was a verdict and judgment against this petitioner, ousting him from his said office; that he thereupon appealed to the Court of Appeals of the District of Columbia, giving a supersedeas bond which was duly approved, and that said judgment was as before stated, on January 4, 1915, confirmed by a majority of the Court of Appeals of the District of Columbia.

That in its said judgment, the majority of the said Court of Appeals erred and said proceedings were erroneous in the respects shown by the Assignments of Error filed herewith and particularly among other things in that—

Jurisdictional Errors of Various Kinds.

1. They failed to limit the right to bring quo warranto proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

2. They recognized the right of an assistant United States District Attorney in the absence of the United States District Attorney, and without instructions from him to grant or refuse permission to

bring quo warranto proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and taxpayer in the District of Columbia as an interested person within the meaning of the Statute governing quo warranto, and therefore, to bring such proceedings, the Attorney General and an assistant District Attorney having refused to bring them.

4. They recognized the right of a Judge and jury to revise and reverse the findings of the President and Senate upon a question of fact governing qualifications of an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a thorough examination into his qualifications and a determination that he was qualified under the law.

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6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statement in substance of the facts as he had narrated them to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge is not instructing the jury in effect that they were required to presume that the official acts of the President and of the Senate in nominating and confirming respondent to the office of Commissioner were regular and proper and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury in effect that the President and Senate having found the necessary residence, such finding could only be overcome by convincing proof.

10. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

11. In not reversing the action of the trial Court in overruling the motions for judgment non obstante veredicto and in arrest of judgment.

And your petitioner claims the right to remove the said cause to the Supreme Court of the United States by writ of error by virtue of the Judicial Code of the United States, Section 250, a writ of error or appeal being allowed from the Court of Appeals of the District of Columbia to the Supreme Court of the United States in the following cases:

"First. In cases in which the jurisdiction of the trial Court is in issue; but when any such case is not otherwise reviewable in said Supreme Court then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

"Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

"Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Wherefore, your petitioner prays the allowance of a writ of error returnable to the Supreme Court of the United States at Washington, District of Columbia, for the correction of the errors complained of and for supersedeas, and that a duly authenticated transcript of record, proceedings and papers herein be sent to the United States Supreme Court.

Dated at Washington, D. C., January 15, A. D. 1915.

OLIVER P. NEWMAN,
By JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
G. W. HOTT,
His Attorneys.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

In the Supreme Court of the United States, October Term, 1914.

No. —.

OLIVER P. NEWMAN
vs.
WILLIAM J. FRIZZELL.

Assignments of Error.

Now comes Oliver P. Newman, plaintiff in error, and respectfully submits that in the records, procedings, decision and final judgment of the Court of Appeals, there is manifest error, to-wit:

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1. They failed to limit the right to bring quo warranto proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

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reverse the findings of the President and Senate upon a question of fact governing qualifications of an office, determination of which was primarily submitted to the President and Senate.

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9. They sustained the trial judge in not instructing the jury in effect that the President and Senate having found the necessary residence, such finding could only be overcome by convincing proof.

10. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

11. In not reversing the action of the trial Court in overruling the motions for judgment non obstante veredicto and in arrest of judgment.

Wherefore plaintiff in error prays that the above assigned errors be inquired of by this Honorable Court and the same be corrected in accordance with law.

OLIVER P. NEWMAN,
By JACKSON H. RALSTON,
WILLIAM E. RICHARDSON,
G. W. HOTT,
Attorneys.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

WASHINGTON, D. C., January 15th, 1915.

In my view it cannot be said that there is no room for doubt whether jurisdiction in the court exists to review. Indeed, in my own mind there is doubt on the subject. But the fact that I merely

entertain doubt and do not have a clear conviction as to the want of power causes me to allow the writ of error.

This conclusion is reached because in my opinion in the absence of a substantial certainty as to the want of power, it is my duty not to impede or obstruct access to the court but to grant the writ in order that the doubts may be solved by the court and not alone by one of its members.

EDWARD D. WHITE,
Chief Justice.

(Endorsed:) No. 2741. Oliver P. Newman vs. William J. Frizzell. Petition of Oliver P. Newman for writ of error, assignments of error, and order of Chief Justice thereon. Court of Appeals, District of Columbia. Filed Jan. 20, 1915. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Oliver P. Newman, appellant, and The United States of America ex rel. William J. Frizzell, appellee, a manifest error hath happened, to the great damage of the said appellant, Oliver P. Newman, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 18th day of January, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas.
EDWARD D. WHITE,
Chief Justice of the United States.

[Endorsed:] No. 2741. Oliver P. Newman, appellant, vs. U. S. ex rel. William J. Frizzell. Writ of Error from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 20, 1915. Henry W. Hodges, Clerk.

Know all men by these presents, That we, Oliver P. Newman, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto William J. Frizzell in the full and just sum of One Thousand dollars, to be paid to the said William J. Frizzell, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a hearing had in the Court of Appeals of the District of Columbia in a suit depending in said Court, between the United States upon the relation of William J. Frizzell against Oliver P. Newman a judgment was rendered against the said Oliver P. Newman and the said Oliver P. Newman having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William J. Frizzell citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Oliver P. Newman shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

OLIVER P. NEWMAN, [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney-in-Fact.

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in presence of—

A. M. RAWLINGS.
O. COLLINS.

Approved to operate as a supersedeas.

EDWARD D. WHITE,
Chief Justice of the United States.

[Endorsed:] No. 2741. Oliver P. Newman, Appellant, vs. United States of America ex rel. William J. Frizzell. Bond on Writ of Error from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 20, 1915. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the United States of America ex rel. William J. Frizzell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Oliver P. Newman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 18th day of January, in the year of our Lord one thousand nine hundred and fifteen.

EDWARD D. WHITE,
Chief Justice of the United States.

Service by copy acknowledged this 19th day of January, 1915.
A. A. BIRNEY,
Of Counsel for Def't in Error.

[Endorsed:] No. 2741. Court of Appeals, District of Columbia. Filed Jan. 20, 1915. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia, January Term, 1915.

No. 2741.

OLIVER P. NEWMAN, Appellant,
vs.
UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

The Clerk in the preparation of the transcript of record to the Supreme Court of the United States in the above entitled cause will include therein the opinions of the Court in the case of United States of America ex rel. William J. Frizzell vs. Oliver P. Newman, No. 2623.

J. H. RALSTON,
Counsel for Appellant.

(Endorsed:) No. 2741. Court of Appeals of the District of Columbia. Designation of counsel as to record on writ of error. Court of Appeals, District of Columbia. Filed Jan. 20, 1915. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

No. 2623.

UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL, Appellant,
v.
OLIVER P. NEWMAN, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Relator, William J. Frizzell, by leave of court, filed a petition praying for a writ of quo warranto to test the right of respondent, Oliver P. Newman, to hold the office of Civil Commissioner of the District of Columbia. The writ was accordingly issued, and for a return respondent demurred to the petition and moved to quash the writ. Upon hearing, the demurrer and motion were sustained, and from the judgment dismissing the petition and quashing the writ relator has appealed.

Relator, a citizen and taxpayer of the District of Columbia, challenges the right of respondent to hold the office of Commissioner, to which he was appointed by the President, with the advice and consent of the Senate, upon the ground that he had not been an actual resident of the District for three years prior to his appointment, and that his appointment was therefore in violation of the following provision of the act of Congress, approved June 11, 1878 (20 Stats. L., 103): "The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else."

The action was brought under Chapter LI of the District of Columbia Code. The following are the sections material to the consideration of this case:

"SEC. 1538. Against Whom Issued.—A quo warranto may be issued from the Supreme Court of the District in the name of the United States.

"First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.

"Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District.

"And said proceedings shall be deemed a civil action.

"SEC. 1539. Who May Institute.—The Attorney-General or the District Attorney may institute such proceeding on his own motion, or on the relation of a third person. But such writ shall not be

issued on the relation of a third person except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

"SEC. 1540. If Attorney-General and District Attorney Refuse.—If the Attorney-General and District Attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

"SEC. 1541. Relator Claiming Office.—When such proceeding is against a person for usurping an office, on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office."

The judgment of the court below is based upon two grounds: First, that the relator, as a citizen and taxpayer, is not an "interested person" within the meaning of the statute, and therefore has no legal standing to apply for the writ; and, second, even conceding that he has such standing, the dismissal of the petition must logically follow, "because it makes no showing that the determination by the President and the Senate as to the qualifications of the respondent was reached otherwise than in the exercise of a reasonable discretion, and, accordingly, their determination was final."

We shall consider these questions in their order. The statute provides three distinct methods by which the proceeding by quo warranto may be brought. It may be by either the Attorney-General or the District Attorney on his own motion; or by either of them on the relation of a third person, by leave of court; or upon the refusal of such officers to bring it at the request of a person interested, such person, by permission of the court, may institute the proceeding. We are unable to distinguish between the "third person" mentioned in section 1539 and the "person interested" mentioned in section 1540. Expressions in quo warranto statutes similar to the words "third person" used in section 1539 have been generally construed by the courts to mean persons interested. The courts have also refused to limit the term "person interested" to persons interested in the office. Hence, it is apparent that Congress, having in mind the well settled definitions of the terms employed, was referring to the same class of persons in section 1540, which provides that, upon failure of the Attorney-General or District Attorney "to institute such proceeding on the request of a person interested, such person may" proceed in his own behalf, as was referred to in section 1539. That Congress did not intend to limit persons interested to those interested in the office, is manifest from

section 1541, which specifically provides a different form of procedure "on the relation of a person claiming the same office." Had such been the intention of Congress, some reference would have been made therein to the preceding section. Indeed, it may well be that the procedure in this section applies only to a private, and not to a public office, for the reason that in this District, where all officers are appointive, there can not be two claimants to a public office.

The statute is general, in that it nowhere distinguishes between usurpers of public or private offices. The right of the relator to have the writ issued depends wholly upon the discretion of the court. In determining whether or not the reasons set forth in the petition "are sufficient in law," the court undoubtedly may inquire into the interest and motives of the party seeking the writ, as well as the sufficiency of the evidence offered by affidavit, or otherwise, in support of the petition to establish probable cause for the allowance of the writ. If it had been intended to limit the right to inquire into the unlawful usurpation of the public office to the Attorney-General or the District Attorney, the statute would have said so in terms. The fact that no such expression is to be found in the statute must be accepted as conclusive evidence that it was not intended.

It is settled law in this country that an individual citizen may sue to enforce the performance of a public duty or to restrain the violation of a public right. Union Pac. R. Co. v. Hall, 91 U. S., 343; Downing v. Ross, 1 App. D. C., 251. The statute, we think, was framed to accord with this accepted theory of the law, and is in line with similar statutes in the States of the Union, in the interpretation of which the courts have followed the decisions of the English courts with reference to the statute of 9 Anne, c. 20, A. D. 1711. Upon refusal of the Attorney-General to act, the English cases are uniform in upholding the right of a citizen to maintain the action of quo warranto to inquire into the right of a municipal officer to hold office. King v. White, 5 Adol. & E., 613, 31 E. C. L. Rep., 753; King v. Parry, 6 Adol. & E., 810, 33 E. C. L. Rep., 424; Queen v. Quayle, 11 Adol. & E., 508, 39 E. C. L. Rep., 279; Rex v. Clarke, 1 East., 38. Says High in his work on Extraordinary Legal Remedies, 2d Ed., sec. 681: "The Statute of Anne extended the remedy by quo warranto information, which had before been considered much in the nature of a prerogative one, to private citizens desiring to test the title of persons usurping or executing municipal offices and franchises, and rendered any person a competent relator in such proceedings who might first obtain leave of the court to file an information."

In the absence of an information by the proper prosecuting officer, who shall become the relator? The statute clearly reposes this power in some one. The "interested person" may be a relator claiming a right to the office. If so, the person interested must become the relator. He is the real party in interest, and the remedy sought is for the enforcement of a private right. But where it is sought to enforce a public right, the people become the real party, and the relator is only required to show that he is interested as a

citizen in having the laws executed and enforced. County of Pike v. State, 11 Ill., 202.

The remedy here sought is for the enforcement of a public right. A citizen and taxpayer of the District of Columbia applied to the Attorney-General of the United States and to the United States District Attorney to bring this action. They refused. He presented his petition to a justice of the Supreme Court of the District, praying an allowance of the writ. The petition was supported by affidavits and other evidence establishing probable cause sufficiently to warrant the court in issuing the writ.

The term "interested person" has received general judicial interpretation by the highest courts of many of the states. In Crovatt v. Mason, 101 Ga., 246, 258, the court, considering a case arising under a statute providing that the writ of quo warranto may issue "at the suit of some person either claiming the office or interested therein," held that "the interest which one who is a citizen and taxpayer has in the due administration of public affairs will entitle him to maintain the proceeding." Citing Churchill v. Walker, 68 Ga., 681; Commonwealth v. Meeser, 44 Pa. St., 341; Waterbury v. Martin, 46 Conn., 479; State v. Vail, 53 Mo., 97; Richards v. Hammer, 42 N. J. L., 435. In Hann v. Bedell, 67 N. J. L., 148, the court, upholding the right of a citizen and taxpayer to interpose by information, not in the name of the Attorney-General, as the statute required, but in the name of the State, and defining a person interested within the terms of the statute providing that "it shall and may be lawful to and for the Attorney-General, with the leave of the Supreme Court, to exhibit in the Supreme Court one or more information or informations in the nature of a quo warranto, at the relation of any person or persons desiring to sue or prosecute the same, who shall be mentioned in such information or informations to be the relator or relators," said: "As a taxpayer and inhabitant of the city, subject to its municipal government, he (the relator) is interested in the due selection of its officers, and is entitled to interpose by information in the nature of a quo warranto when such officers have been illegally selected."

In State v. Barker, 116 Iowa, 96, involving the validity of the appointment of a board of water-works trustees, the court was considering a statute very similar to ours, which provided, among other things, that "if the county attorney on demand, neglects or refuses to commence the same, any citizen of the state having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may bring and prosecute the action to final judgment." The court, speaking through Mr. Justice Deemer, said: "It is admitted that the county attorney refused to bring the action, and the only question for decision on this branch of the case is, Has the relator such an interest in the question as that he may apply to the court for leave to do so? We think he has such interest. A private citizen and taxpayer is undoubtedly interested in the duties required of the several public officials who are authorized to levy taxes. This is not a contest over an office, as were many of the cases

cited in appellee's brief, but a matter of public interest in which relator has a special interest by reason of being a contributor to the funds."

In State v. Mason, 14 La. Ann., 505, and Voisin v. Leche, 23 La. Ann., 25, the court, considering a provision of the Louisiana Code taken from the Statute of Anne, providing that "a mandate to prevent a usurpation of an office in a city or other corporation may be obtained by any person applying for it," held that the court would consider the words "any person" to mean "any person having an interest." Under this interpretation the court held that a mere citizen and taxpayer was without standing to maintain the action; but in State v. Kohnke, 109 La., 838, the court, while approving the interpretation placed upon the words "any person" appearing in the statute, reversed the holding as to the degree of interest which the relator must show to enable him to exhibit the information. On this point the court said: "The other reason assigned by the court is that 'any person' means 'any person having an interest' and that, the statute itself being silent regarding the degree of interest required, the courts must supply the deficiency. This is true; but for more than a hundred years before the Mason suit was filed the courts of the country from which our Code borrowed this term of 'any person' had determined and fixed by a settled jurisprudence what this interest should be, and had settled that any inhabitant of a borough or town has a sufficient interest. Our conclusion must be that our Code, when it says 'any person,' means what it says; and that, therefore, the relator, as a resident and a taxpayer of the city, is competent to stand in judgment in the case."

In a number of States the language of the Statute of Anne, "any person," has been incorporated in the statutes, and in each instance it has been held that the person seeking the writ must not be a mere volunteer, but must be a citizen or taxpayer, or both, of the municipality in which it is sought to oust the officer. Waterbury v. Martin, 46 Conn., 479; Williams v. Samuelson, 131 Wis., 499; Hann v. Bedell, 67 N. J. L., 148; Commonwealth v. Meeser, 44 Pa. St., 341.

A careful review of the cases relied upon by respondent, and referred to in the opinion of the learned justice below, discloses a lack of analogy to the present case. In many of the cases, the statutes under consideration limit the right to present the information to the Attorney-General or District Attorney or to a person interested in the office.

In State v. Matthews, 44 W. Va., 372, a case strongly relied upon by respondent, the West Virginia statute provides that the writ may be applied for only by the Attorney-General or prosecuting attorney, either at his own instance, or on the relation of any person interested. In that case the petition was filed without the consent of the prosecuting attorney, and he refused in open court to give his consent. The court seems to intimate that, notwithstanding the limitation of the statute, a person interested in the office could, by leave of court, become a relator to enforce his private right. Indeed, this seems to be the rule in other States where the statutes expressly limit

the right to bring the action to the proper prosecuting officer, either in his own name or on the relation of another.

In State v. Dahl, 69 Minn., 108, the court held that, under a statute requiring the consent of the Attorney-General as a condition precedent to the bringing of the action, it might not only be brought, by leave of court, and without the consent of the Attorney-General, by a person having an interest in the office to enforce a private right, but when, as in the case at bar, the office is appointive, and no one by reason of that fact can assert an interest in it, and the Attorney-General refuses to act, the action may be brought by leave of court by a private person having no interest in the question distinct from the public. On that point the court said: "The Attorney-General has refused his consent to the institution of the proceeding, and, if his refusal is conclusive, that would end the matter. If this be so, there could not be, in the nature of things, any person who would be permitted to file an information as against an appointee to a public office, without the consent of the Attorney-General, the result being anomalous, in that, if the office were elective, a private party personally interested might proceed in the absence of consent, but, if it were appointive, the matter would be wholly within the control of the law officer of the State. No person could show that if an incumbent of any certain appointive office was found ineligible, and, for that reason, ousted from the place, he would be entitled to or would become a successor. We do not now question the correctness of the decision in Barnum v. Gilman, 27 Minn., 466, but it is supported by any number of adjudicated cases, as the rule was applied to the facts there presented, but we are not ready to hold that it is applicable here, where the officer, if Dahl be an officer, is appointed, instead of elected, and where it would be impossible for another party to show that he had a personal interest in the question to be decided distinct from the public. In fact, we are of the opinion that this court has the right, and that under some circumstances it may, in the exercise of a sound judicial discretion, become its duty to permit an information in the nature of quo warranto to be filed by a private person (having no personal interest in the question distinct from the public) to test the right of an incumbent of a public office to hold the same, notwithstanding the Attorney-General has refused to give his consent to such filing." It will be observed that, according to the sound reasoning of the Minnesota court, even if the interpretation placed upon our statute by the lower court is correct, it is still within the discretion of the court to allow the writ, inasmuch as the office held by respondent is appointive, and no one exists who could legally lay claim to it.

In Miller v. Palermo, 12 Kan., 21, the decsion was under a statute limiting the right of action to the Attorney-General or county attorney or to "a person claiming an interest in the office." And in State v. Stein, 13 Nebr., 529, the Nebraska statute provided only for the action at the instance of "the prosecuting attorney of the proper county," or of any citizen of the State who "shall claim any office which is usurped, invaded, or unlawfully held and exercised by another."

In Reynolds v. State, 61 Ind., 392, and State v. Reardon, 161 Ind., 249, the court was considering a statute providing as follows: "The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information." It was there held that, under the limitations of the statute, quo warranto could not be brought by a private person unless the relator could show "some right or interest in the office himself."

In People v. Attorney-General, 22 Barb., 114, and People v. Fairchild, 67 N. Y., 334, the decisions were rendered under a statute of New York, providing that "the Attorney-General may maintain an action, upon his own information, or upon the complaint of a private person." It was there held, under the restrictions of the statute, that a citizen and taxpayer could not bring the action on behalf of the public. To the same effect are Everding v. McGinn, 23 Ore., 15, and Robinson v. Jones, 14 Fla., 256, where the courts were considering statutes which are substantially the same as the statute of New York, and where the court in each instance adopted the construction placed upon the statute by the New York court.

Under the Missouri statute only "the Attorney-General of the State or any circuit or prosecuting attorney of the county in which the action is commenced" may exhibit an information "at the relation of any person or persons, desiring to sue or prosecute the same." The court construed this statute as not being mandatory, and in the decisions relied upon by respondent (State v. Talty, 166 Mo., 529, and State v. Taylor, 208 Mo., 42) refused to compel the prosecuting attorney to file the information at the request of a third person.

The same question was before the Michigan Supreme Court in Yates v. Attorney-General, 41 Mich., 728, and Coon v. Attorney-General, 42 Mich., 65, cited by respondent, where the action could be brought only by the Attorney-General in the Supreme Court. In the former case it was held that the court would not review the discretion of the Attorney-General. In the latter case the court refused to hold that it would not under any circumstances compel the Attorney-General to file an information. But under a statute subsequently enacted providing that the information might be filed "by the prosecuting attorney of the proper county, on his own relation, or that of any citizen of the county, without leave of the court, or by any citizen of the county by special leave of the court," the court, in Vrooman v. Michie, 69 Mich., 42, held that this permitted an action by a private claimant of office, which "is a purely private litigation, but that a private citizen could not bring the action on behalf of the public." In Lamoreaux v. Attorney-General, 89 Mich., 146, the court, adhering to the rule that a private citizen could not bring the action on behalf of the public, since all public prosecutions should be brought by the Attorney-General or prosecuting attorney, held that, upon refusal of these officers to bring the action, they could be compelled to do so by mandamus at the suit of a citizen and tax-

payer. This, of course, accomplishes indirectly what is accomplished directly under section 1540 of our Code. It indirectly gave a citizen and taxpayer the right to test the qualifications of an officer to hold office. The court was led to this conclusion upon the reasoning that any other course would leave it in the power of the Attorney-General and prosecuting attorney to arbitrarily retain in office a person disqualified by law to hold it. On this point the court, in part, said: "If the Attorney-General and prosecuting attorney can refuse, for no good reason, to file an information of this kind upon the relation of one who claims that he was legally elected to an office, or of any elector, citizen, and taxpayer, who is interested in the due administration of public affairs, then it may happen that, if both of these officers belong to the same political party as the incumbent of the office, they would for that reason refuse to move in the matter, and keep in any county office for the full term a person not legally elected or legally qualified to hold it. * * * The public are vitally concerned in every election. What particular individual shall hold a particular office is not of so much consequence, but it is vital to the existence of a free government that there shall be a free, legal ballot, and an honest count; and that no one shall be permitted to hold an office not legally elected thereto, or qualified under the Constitution to hold it, if any elector and taxpayer shall object. Every honest citizen is interested and concerned in this matter, and has a legal right to be so. The Courts ought not to consent to any holding which will put the power arbitrarily and without remedy or redress into the hands of any one, two, or three men to prevent a candidate for office from establishing his election to any office, or any citizen from inquiry in good faith into the rights of any person to hold an office. This would certainly be the result of the position taken by the Attorney-General."

In People v. Haley, 23 Ill., 280, the court, under a statute providing that quo warranto may be brought only by "the Attorney-General or State's attorney of the proper county, either of his own accord or at the instance of any individual relator," held that the State's attorney may be compelled to bring the action at the instance of an individual having a private right or grievance distinct from that of the public at large.

State v. Taylor, 50 Ohio St., 120, involved the application of a private individual for leave to file a petition in quo warranto under a statute of Ohio which authorized the Attorney-General or prosecuting attorney to bring the action of his own motion or by leave of court on the relation of another person, or by a person claiming the office. The court treated the motion as an application to the court to direct the Attorney-General to bring the action, which was refused on the authority of Thompson v. Watson, 48 Ohio St., 552.

In Pennsylvania we find a liberal statute authorizing the issuance of a writ on the suggestion "of any person or persons, desiring to prosecute the same." It was held in Commonwealth v. Burrell, 7 Barr, 34, where the petition was by an individual for a writ against a judge of the Court of Common Pleas, that the statute would not permit the action by a private citizen to redress a public wrong, but

it was distinctly held that "on the usurpation of a municipal or corporate office * * * no franchise or exclusive right of the Commonwealth is invaded; and the intervention of a private prosecutor was extended to it, but not as a remedy for a public wrong." Other decisions of the same court (Commonwealth v. McCarter, 98 Pa. St., 607, referred to in brief of respondent) held "that no mere private person, unless he had a private grievance to redress, could be heard on a writ of quo warranto." But in Commonwealth v. Meeser, supra, the writ was granted upon the petition of a private citizen to test the right of a member of the common council of a city to a seat in that body. Hence, it appears that, in that State, as in this District, the writ will be granted to a private citizen not interested in the office when the application, in the judgment of the court, is sufficient in law.

We have reviewed at great length the authorities relied upon by counsel for respondent. In these cases, of course, the particular statute in each jurisdiction must control, and where the statute in express terms, or by necessary implication, provides that the information shall be made only by the proper prosecuting officer, a mere citizen or taxpayer is without standing (except in Minnesota, where the court granted it in exercise of its inherent power); but in many instances, it will be observed, the statute restricts the right to bring the action to a person who can show an interest in the office superior to the officer against whom the writ is directed. In that instance, it becomes a private action for the enforcement of a private right, and not an action on behalf of the public. In other cases cited, it was sought to control the discretion of the prosecuting officer, and it was held that the discretion as to bringing the action of quo warranto reposed in him by statute could not be controlled. In other cases, a rule contrary to the latter was announced; but in none of the cases cited does the statute provide for the bringing of the action by a person interested merely, nor does it make any provision for bringing the action upon the refusal of the proper prosecuting officer to act when requested.

The learned justice below was led into this line of decision by interpreting the words "person interested" in section 1540 to mean a person interested personally in the office. In no case called to our attention has the expression "person interested" been interpreted to mean a person interested in the office, except possibly in State v. Matthews, supra, where the court intimated such a holding in a discussion not essential to the decision of the case. In each instance, where it has been held that a relator must be a citizen personally interested in the office, the decision was prompted by the express terms of the statute. Applying the same sound rule of statutory control of judicial decision, we must hold that "person interested" is broad enough to admit of any citizen and taxpayer of the District of Columbia, by leave of court, exhibiting an information in quo warranto to test the right of an officer to hold a public office. Indeed to hold otherwise would require us judicially to read into the statute some-

thing not reasonably deducible from the language employed by Congress in its enactment.

It is proper to inquire into the purpose of Congress in the enactment of this statute. Unquestionably it was to provide for a judicial determination of the right of a person to hold an office in the District of Columbia. In West Co. v. Lea, 174 U. S., 590, Chief Justice White, discussing the construction of statutes where the text is ambiguous, stated that "then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmakers would govern." Or, as stated in District of Columbia v. Brooke, 214 U. S., 138: "Not only the purpose of the law must be considered, but the means of its administration." Congress was fully cognizant that the courts generally have held the words "a person interested" or "interested person," used in similar statutes, to embrace a citizen and taxpayer. Congress, it must be assumed, realized that, unless the words should be so interpreted, the statute would be meaningless; for, since all officers are appointed in this District, no one, other than a citizen or taxpayer, could be "a person interested" within the contemplation of the statute.

The Attorney-General and the District Attorney each receives his appointment from the same source from which the principal officers of the District receive theirs. There is not such independence of action as where officers receive their commissions directly from the people by public election. Confronted by the presumption which attaches to every appointment to office, that the qualifications of the officer have been fully inquired into by the executive before the nomination is sent to the Senate or the appointment finally made, Congress appreciated the delicate situation in which these officers are placed, and assumed that naturally they would hesitate to challenge the exercise of the discretion thus imposed in the President. There was reason, therefore, for Congress to enact a statute out of the ordinary and specially adapted to meet local conditions. All officers in the District of Columbia are appointed; none are elected as in the States. As was so clearly pointed out by the Minnesota court in the case of State v. Dahl, supra, we have here the anomaly that there can not be found a person qualified to assert such an interest in any office as would authorize him to become relator for the enforcement of his private right thereto. The Commissioners are the chief administrative officers of the District; and Congress, in its wisdom, saw fit for the better Government of the District, to place this limitation as to residence in the statute. It therefore becomes important that persons appointed to this office shall meet fully the prescribed qualifications. Nor is it proper for the courts to treat with indifference a provision of law which so vitally concerns the rights of every citizen.

Inasmuch as no one could show such an interest in an appointive office as would permit him to bring the action to enforce a private right, the contention of respondent would not only render section 1540 of the Code a nullity, when applied to public offices, but would repose in the executive officers of the Government the power to set at naught the will of Congress and appoint to and retain in office a person disqualified by law. Such power, as was so clearly pointed

out by the Michigan court in Lamoreaux v. Attorney-General, supra, should never, except in the case of an express constitutional command, be upheld by the courts. We think it was to meet the possible exigency of the exercise of mistaken authority that Congress placed it within the power of a citizen and taxpayer of this District to challenge the right of an officer to hold unlawfully an office therein. The personnel of the Commissioners is a matter of the greatest concern to every citizen and taxpayer of the District of Columbia. We conceive it, therefore, to be the duty of the courts, if possible, to so construe the statute as to make it effective to afford the protection manifestly intended by Congress in its enactment.

This brings us to the second and less difficult question involved in this appeal, Is this action directed to the control of the discretion of the President of the United States? By the long line of decisions cited by the learned justice below, it is settled law that, where an executive officer of the Government is vested with discretionary power in the execution of a law, the exercise of that discretion can not be controlled by judicial process. It is only where such an officer is charged by law with the performance of a mere ministerial act, devoid of discretion, that the courts will intervene to command its performance or restrain its violation.

But relator is not seeking either to review the action of the President in making this appointment or to control his discretion. The purpose of the writ is not to compel the President to appoint a certain citizen nor to define a class of citizens from which a selection shall be made. It is to inquire into an alleged mistaken conception of the law by which it is claimed that a disqualified person has been installed into a public office. It may be that a trial upon the merits will disclose that no mistake was made, but that is a question of fact proper for judicial inquiry. Such a judicial inquiry is always permissible, regradless of the source from which the officer derives his commission. "We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the legislature, and the judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law." Floyd Acceptances, 7 Wall., 666, 676.

This action is not directed against the President. He is not a party to it, as would be essential were it sought to control his action. Neither is it an action to review the inquiry made by the President and the Senate into the qualifications of respondent. The case has passed beyond the point where it concerns either the President or the Senate. The manner of respondent's induction into the office of Civil Commissioner is only an incident in this suit. The real question here is whether he is lawfully entitled to hold the office, irrespective of the care exercised by the President and Senate in selecting him.

The President has no inherent power to appoint to office. His

power as to certain officers is conferred by the Constitution, and, under the same provision (Art. II, sec. 2), in the absence of congressional direction as to the appointment of a Federal officer, he would undoubtedly have the power to make the appointment. But Congress may vest the power either in itself or the executive or the judicial branches of the Government. It is a political power, in this instance, conferred upon the Chief Executive. "The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President, according to his own discretion." Marbury v. Madison, 1 Cranch., 137, 166. It is clear that there can be no review of the exercise of this power so long as it is exercised within the limitations of the law. But it is alleged it was not so exercised in making this appointment. In this instance, the executive power to appoint Commissioners of the District of Columbia was conferred by the act of 1878; and the power being delegated by the statute, it must be performed strictly in accordance with its provisions. The statute does not impose upon the President and Senate the duty of determining, from evidence taken, the qualifications of persons to hold the office of Commissioner. They may do so or not, as they choose. But it does emphatically prohibit a non-resident from holding the office. The question presented is neither political nor executive; it is legal and judicial. Hence, there is no judicial invasion of executive discretion.

But it is urged that to extend this power to a citizen is equivalent to placing a limitation upon the power of the President to remove an officer appointed by him. A Commissioner of the District of Columbia is appointed for a term of three years, and the fixed tenure of office makes the office permanent. It is undoubtedly within the power of the President to remove a Commissioner of the District from office (Parsons v. United States, 167 U. S., 324; Shurtleff v. United States, 189 U. S., 301), as it is within the power of the State to remove an officer elected to office. It hardly will be contended that it follows by analogy that, because the President has the power to remove an officer, the grant of that authority carries with it, by implication, the power to appoint to an office a person disqualified by law from holding it. The absurd conclusion sufficiently answers the proposition.

The judgment is reversed with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Chief Justice SHEPARD dissenting:

I am obliged to dissent from the judgment of the court in this case.

I have not the time, nor do I consider it important to review the statutes and decisions of the several States relating to the general subject of quo warranto proceedings. The provisions of our Code (sections 1538, 1539, 1540, 1541) speak for themselves.

Those sections are copied in the opinion of the court and will be

here stated in substance only. Section 1538 authorizes the writ to issue against a person who unlawfully exercises a franchise or public office, or an office in any domestic corporation, and against persons exercising corporate rights or franchises not authorized by the laws of the District. Section 1539 authorizes the Attorney-General or the District Attorney to institute the proceeding on his own motion, or on the relation of a "third person." Plainly this third person, upon whose information the law officers may act, is not required to have any special interest in the matter of the inquiry. Whether they shall institute the proceeding on their own motion, or upon the relation of the third person is a matter entirely within the discretion of the law officers; except that in the latter case leave of the court must also be obtained, and security given for costs.

If the law officers refuse their consent the "third person" cannot institute the proceeding. Section 1540 provides, however, that if the officers refuse to act upon the request of a "person interested" "such person" may apply to the court for leave, etc. In my opinion the intent is here plainly expressed to limit the right to institute the proceeding, without the consent of the law officers, to an "interested person," that is to say, to such third person only who may have and show a special interest in the matter of the inquiry.

The function of the legislature is to enact laws; that of the judiciary to interpret them where they need interpretation. The intention of Congress seems to me too plainly expressed to leave room for interpretation. Hence, there is no occasion to examine the statutes of other jurisdictions relating to quo warranto proceedings, the language of which Congress did not adopt, or the decisions interpreting them, to ascertain the intention of Congress.

Under the peculiar municipal organization of the District of Columbia, the government is in Congress, the Commissioners being merely its agents. They are invested with no general legislative powers; they do not levy taxes or fix the rate thereof. It is true that good government depends, in a measure, upon the honesty and efficiency of these agents of Congress, and the residents of the District are all interested, as are all residents of municipalities in general (though not to the same extent) in good government.

This is a general public interest concerning taxpayers, as such, no more than other residents.

Taxpayers, it is true, are sometimes permitted to enjoin the making of contracts, or the fixing of burdens upon property, but in such cases it is apparent that they have a special property interest to assert and protect. There is no such question involved here.

Relating to the question who shall exercise the office of Commissioner of the District, the interest of the taxpayer is in common with all other residents.

In other words, it is a public interest, the conservation of which is entirely under the control of the Attorney-General or the District Attorney.

Public policy in this regard is for the determination of Congress exclusively. I see nothing negativing these views in the case of Union Pacific Railroad v. Hall, 91 U. S., 343, 354.

In that case the relators were shippers of freight over the railway and had, therefore, an interest peculiar to themselves, and others similarly situated. Moreover, it was a proceeding for a writ of mandamus the rules governing which were not governed by statute and are different from those governing quo warranto. It has become in modern practice substantially nothing more than an action at law, the consent of the Attorney-General no longer being an essential. Dancy v. Clark, 24 App. D. C., 487, 497, and cases there cited; Bundy v. U. S. ex rel. Darling, 25 App. D. C., 459, 462.

Section 1541, so far as it relates to public office, is practically inoperative under the laws now governing the selection of District officers. It may, possibly, govern a proceeding where an officer in a private corporation may be involved. In such case the relator is required to set forth specially the facts upon which he claims to be entitled to the office. I perceive no bearing that this section has upon this case.

I base my dissent upon the sole ground that the independent relator is not an interested person within the meaning of the statute, and is not, therefore, entitled to maintain this action without the approval of the Attorney-General or the District Attorney, to whom the interests of the public are intrusted.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 106 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals, together with a copy of the opinion in No. 2623 as designated by counsel, in the case of Oliver P. Newman, Appellant, vs. United States of America ex rel. William J. Frizzell. No. 2741, January Term 1915, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington this 20th day of January A. D. 1915.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

[10-cent revenue stamp, cancelled 1, 20, '15. H. W. H., Clerk.]

Endorsed on cover: File No. 24,557. District of Columbia Court of Appeals. Term No. 813. Oliver P. Newman, Plaintiff in Error, vs. The United States of America ex rel. William J. Frizzell. Filed February 13th, 1915. File No. 24,557.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 813.

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA EX REL. WILLIAM P. FRIZZELL, DEFENDANT IN ERROR.

Comes now the defendant in error and moves the court to advance the hearing of this cause to an early day, within the current term, if the business of the court will permit, and for cause shows as follows:

First: The case is one in *quo warranto* to determine the right of the plaintiff in error to hold the office and exercise the functions of Commissioner of the District of Columbia, it being averred that under the statute creating such office he is ineligible thereto. After a trial before a jury in the Supreme Court of the District of Columbia, he was adjudged a usurper of the office and ousted therefrom. Upon his appeal to the Court of Appeals this judgment was affirmed, and from this judgment the cause was brought to this court by writ of error.

Second: The cause is one of large public interest to the people of the District of Columbia, and to others, dealing with the municipality, in that it involves the right of the plaintiff in error to hold the office and

exercise the functions of Commissioner of the District of Columbia with all the powers and rights attached thereto.

Third: That although plaintiff in error was by judgment of the Supreme Court of the District of Columbia, which was affirmed by the Court of Appeals, adjudged to have usurped the office of Commissioner of the District of Columbia and to be ousted therefrom, he has continued and yet continues to exercise the functions of that office, to receive the pay attached thereto, declare jointly with the two other Commissioners regulations in the nature of ordinances and otherwise act as if such judgment of ouster had not been entered, whereby great confusion and damage have resulted and will result, all of such official acts of the said plaintiff since the judgment of ouster aforesaid being void as this movant is advised.

Fourth: That should the hearing be not advanced it is probable that the term for which the plaintiff in error was appointed to office will be completed before the cause will be heard in regular order and the plaintiff in error will thereby gain all that he could gain through success in this action and thereby defeat the purpose of the law.

Respectfully submitted.

ARTHUR A. BIRNEY,
WILLIAM J. NEALE,
Of Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No.

OLIVER P. NEWMAN

vs.

UNITED STATES OF AMERICA ex Rel. WILLIAM J. FRIZZELL.

PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI REQUIRING THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVISION AND DETERMINATION THE APPEAL TAKEN BY OLIVER P. NEWMAN IN THE ABOVE-ENTITLED CAUSE, BEING EQUITY CAUSE No. 2741, IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Oliver P. Newman respectfully represents:

1. The petitioner is a citizen of the United States and resident of the District of Columbia.

2. That heretofore, to wit, on September 2, 1913, one William J. Frizzell filed in the Supreme Court of the District of Columbia his petition for *quo warranto* against this petitioner (Record, p. 4), setting up in brief that under the act of Congress approved June 11, 1878, there was provided a permanent form of government for the District of Columbia, directing that said District should remain a municipal corporation, and that the President of the United States, by and with the advice and consent of the Senate, should appoint two citizens, with an army officer, to be the Commissioners of said District, and that the persons so appointed from civil life should serve for three years and until their successors should be appointed and qualified; that "the two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States and shall have been actual residents of the District of Columbia for three years next before their appointment and have during that period claimed residence nowhere else;" that on June 26, 1913, the President nominated to the Senate Oliver P. Newman as a Commissioner appointed from civil life; that said appointment was confirmed by the Senate; that on July 13, 1913, he took the prescribed oath and entered upon such office, and has ever since and yet holds the same; that he was not qualified in law to receive such office and has unlawfully assumed and usurped the said office, and is not lawfully entitled to the same or to exercise the functions and enjoy the emoluments thereof, because at the time of his appointment he had not been an actual resident of the District of Columbia for three years next preceding such appointment, and during such period he claimed residence elsewhere than in the District of Columbia, to wit, at Chicago, Illinois, and Princeton, New Jersey, as will appear from affidavits and his statement attached and prayed to be taken as part of said petition; that the petitioner was desirous that proper proceeding by *quo warranto* be taken to determine Newman's right to said office, and to that end had applied to the Attorney General and to

the Attorney of the United States for the District of Columbia, and requested them to take such proceedings, but they had refused to institute the same; that copies of his letters to the Attorney General and the United States Attorney for the District of Columbia and of their answers thereto were attached and prayed to be read as part of the petition.

The petitioner, tendering himself ready to file a bond as provided by law, prayed leave of court to have the writ of *quo warranto* issue in the name of the United States, upon his relation against said Newman, requiring him to show by what warrant he held or exercised such office, and to answer the averments of the petition, and thereafter such proceedings should be had as were prescribed by law, and if it be found that he had usurped and intruded into or unlawfully held office, that he be ousted and excluded therefrom.

To the petition were attached the affidavit of George C. Montgomery that Newman had registered in New York on September 12, 1912, giving his residence as Chicago, Ill., and also the affidavit of C. C. Lancaster, that he had procured a copy of a lease he had entered into for premises in the Florence Court apartment house, and that he had examined the hotel register of the Hotel Shoreham, and found that said Newman was a guest from March 3 to March 5, and that the hotel register showed "Oliver P. Newman, Princeton, New Jersey"; also the affidavits of James M. England and Carlton W. Statton, that they had found that some time in the year 1910 letters addressed to Newman at the Westminster apartment house, in the District of Columbia, had been returned undelivered, and the further affidavit of James M. England that on an examination of the court records of the municipal court, he had found a marshal's return indicating that said Newman had left Washington to go into business in Chicago. Further, the affidavit of William J. Frizzell that he had examined the real estate and personal tax registers of the District of Columbia from July 1, 1908, to June 30, 1913, and had failed to find the name of

said Newman, and had found his name in the Chicago City Directory for the year 1912, as reporter, living in said city, and that the City Directory of St. Joseph, Missouri, showed the entry of his name for the years 1908 and 1909, and the directory for 1910 had an entry that he had removed to Lincoln, Nebraska, and in the City Directory of Lincoln, Nebraska, he had found his name for the year 1910.

There was also attached a lengthy statement made by this petitioner before the Senate Committee of the District of Columbia covering the question of his residence.

There was further attached a letter from Hon. J. C. McReynolds, Attorney General, declining to institute proceedings to test his right to hold the office of Civil Commissioner, with a letter from W. J. Frizzell, addressed to the United States Attorney for the District of Columbia, asking the institution of such proceedings, a letter signed by James M. Proctor, Assistant United States Attorney, in charge, under the heading of the office of the United States Attorney, District of Columbia, and dated October 23, 1913, acknowledging receipt of a letter requesting the institution of proceedings in *quo warranto*, and stating that the District Attorney was spending his vacation in Europe and would not return for a month, and, then acting in his stead, he (Proctor) declined to comply with the request.

This petitioner, through his attorneys, objected to the granting of leave to file the petition for the writ of *quo warranto*, said objections (Record, pp. 1 to 4) setting up the want of sufficient interest in said Frizzell to institute such proceedings; that the President and Senate had examined into and determined petitioner's qualifications for office, and that same could not be reviewed by any judicial authority; that relator had appeared before the committee of the Senate having the matter in charge and objected to such confirmation, but that said objections were unanimously overruled by the Senate committee, and could not be again reviewed; that the respondent had been found duly qualified

by the President and Senate, and was so qualified that his appointment was for the term of three years, during which time he was subject to removal by the President; that a writ of *quo warranto* would not lie in any instance where the appointee was at all times subject to removal by the appointing power; that no public interest would be subserved by the granting of the petition, but that the exercise of public functions would be hampered and interfered with by the granting of the permission prayed for; that official permission on the part of the Attorney General of the United States and the United States Attorney for the District of Columbia had been refused because no public interest would be subserved; that this petitioner verily believed that the petition was not filed in good faith, but at the instigation of persons unknown to the petitioner, whose animus should be the subject of inquiry and whose names and contributions should be fully disclosed, to the end that the process of the court might not be abused to serve private animosities or interests; that the whole procedure was an attempt to invoke an infringement by the judicial authorities upon the powers, responsibilities, and duties of the Executive and Legislative branches of the Government charged with the determination of the qualification of appointees to office, and whose conclusions were final as to such matters.

That nevertheless the justice of the Supreme Court of the District of Columbia, acting in the matter, granted leave to file said petition, to which this petitioner excepted and objected (Record, p. 15); that upon the issuance and service of the writ of *quo warranto* this petitioner, through his attorneys, moved to quash and at the same time, and without waiving the motion to quash, demurred to the petition (Record, pp. 17, 18, and 19), for reasons in substance repeated in the motion for judgment *non obstante veredicto* and in arrest of judgment, hereinafter referred to, and also in substance set out in the errors hereinafter enumerated.

That upon the hearing the justice of the Supreme Court of the District of Columbia having the matter in charge sustained the motion to quash and the demurrer and dismissed the petition, from which action the petitioner William J. Frizzell appealed to the Court of Appeals of the District of Columbia, and upon the hearing in said Court of Appeals judgment and action in the Supreme Court of the District of Columbia was reversed, and the cause remanded for further pleading and trial, whereupon this petitioner filed his answer and pleas (Record, pp. 31 and 32), in which, among other things, he denied that he was not qualified in law to receive such appointment, or had unlawfully assumed or usurped said office, or was not entitled to the same, or to exercise the functions and enjoy the emoluments thereof, and denied that he had not been an actual resident of the District of Columbia for three years next before the time of his appointment, and denied that he had ever claimed residence elsewhere than in the District of Columbia during said period of three years, although admitting that at various times he had other temporary business addresses. He denied that the petitioner had ever made legal application to the attorney of the United States for the District of Columbia prior to the proceedings, or that such District attorney had ever refused to institute the same. He further stated that he was nominated by the President to the Senate as Civil Commissioner, duly confirmed, and took the prescribed oath on July 19, 1913, and has ever since held and yet holds such office, and that then and for three years theretofore he had been an actual resident of the District of Columbia, and during such period had claimed residence nowhere else. He averred that he was duly qualified to be appointed Civil Commissioner when appointed, and that such appointment was nominated to and confirmed by the Senate upon thorough review of his qualifications, which body determined that he was qualified therefor within the meaning of the statute, and such determination was final and conclusive; that he held the

office in conformity to law, was duly qualified, had met all legal requirements, was lawfully entitled thereto, and denied that he had usurped or intruded into or unlawfully held the same, or had so done at any time before the commencement of the action or trial therefor. Thereafter a trial was had and a verdict of the jury returned against this petitioner. A motion for new trial was filed and overruled. At that same time motions for judgment *non obstante veredicto* and in arrest of judgment were filed upon the following grounds:

1. That the power to determine the qualifications under the law of the respondent as Civil Commissioner of the District of Columbia rested primarily with the President and Senate, and as it appears from the petition that the advice and consent of the Senate was only given after a thorough examination into his qualifications and a determination that he was qualified, as appears from the petition, no power to review such action rests in any court or jury, and unless in any event the court could have charged the jury that there was no evidence at all tending to show the respondent's qualifications and justifying the Senate's action (and it could not and did not so charge) such a revision of the Senate's action by a court or jury would be a violation of the constitutional separation of the powers of government.

2. The relator in his petition does not show that he has such an interest in the writ that he was entitled to invoke the jurisdiction of this court, the Attorney General or United States Attorney for the District of Columbia alone, if any one, being entitled to bring the action.

3. That this respondent having been appointed a Civil Commissioner of the District of Columbia, as shown by the petition, by the President of the United States and confirmed by the Senate, their conclusions are final, and no power of review of his qualifications resides in any court or jury, and the exercise of such power would be an infringement upon the powers of a co-ordinate branch of the Government.

4. That the appointment of this respondent is for the term

of three years, but that during such period of three years he is subject to removal by the President at all times, and that a writ of *quo warranto* will not run in any instance where the appointee is at all times subject to removal by the appointing power.

5. That the Attorney General of the United States having refused to file the petition of *quo warranto* asked for by the relator, and his action being based upon the manifest fact that no public interest would be subserved in the prosecution thereof, such determination on his part was conclusive, the United States Attorney for the District of Columbia not having acted in a contrary sense.

6. That the relator has not shown any interest in the office itself as contemplated by the statute, and has, therefore, no interest upon which could be based any petition for *quo warranto* as herein granted.

7. That no inquiry was made by the court prior to the issuance of the writ as to the motives of the relator, which should have been had to determine whether the discretion of the court ought to be exercised to permit the filing of the petition.

8. That it does not appear that the United States District Attorney for the District of Columbia ever refused to institute this proceeding on the request of the relator, and said relator has, therefore, no right to institute the said proceeding on his own behalf.

9. That it does not appear from the petition that any public interest whatsoever was subserved by its filing and such a writ may not be used for private purposes.

These motions were overruled and judgment was given ousting this petitioner from his office; whereupon a bond, to operate as a supersedeas, was given and approved, and an appeal taken to the Court of Appeals. Upon the hearing in the Court of Appeals the judgment below was affirmed.

That while this petitioner believes that he is entitled to an appeal to this court, upon the record, by way of writ of error,

yet he says that doubt as to his right thereto is believed to exist, as shown by the fact that he has applied to the Court of Appeals of the District of Columbia for the allowance of a writ of error, and that such application has been refused, and therefore out of abundance of caution he finds it necessary to present this petition for certiorari to the Supreme Court of the United States.

This petitioner further respectfully represents that the trial court, as well as a majority of the Court of Appeals, erred in their conclusions of fact and the trial court, as well as a majority of the Court of Appeals further erred in their conclusions of law, as shown by erroneous exclusion of evidence offered to support this petitioner's contentions, instructions, and refusal of instructions to the jury, overruling all motions in arrest of judgment, and for judgment *non obstante veredicto,* and in the conclusions of law, as expressed by the opinion of the Court of Appeals herein, as well as in the original granting of leave to file the petition for *quo warranto,* among other things, in the following respects:

1. They failed to limit the right to bring *quo warranto* proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

2. They recognized the right of an assistant United States District Attorney, in the absence of the United States District Attorney, and without instructions from him to grant or refuse permission to bring *quo warranto* proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and taxpayer in the District of Columbia as an interested person within the meaning of the statute governing *quo warranto,* and, therefore, authorized to bring such proceedings, the Attorney General and an assistant District Attorney having refused to bring them.

4. They recognized the right of a judge and jury to revise and reverse the findings of the President and Senate upon a

question of fact governing qualifications for an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a thorough examination into his qualifications and a determination that he was qualified under the law.

6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statemnt in substance of the facts as he had narrated to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge in not instructing the jury in effect that they were required to presume that the official acts of the President and of the Senate in nominating and confirming resopndent to the office of Commissioner were regular and proper and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

10. In not reversing the action of the trial court in overruling the motions for judgment *non obstante veredicto* and in arrest of judgment.

Your petitioner further respectfully represents that the record involves the consideration of propositions of great public importance, many of which have not heretofore been presented to this honorable court; that if the decision of the Court of Appeals of the District of Columbia is to stand a court and jury of the District of Columbia will enjoy the

right to review and revise the careful judgment of the President and of the Senate of the United States, as to qualifications of duly appointed and confirmed officers, upon which they have expressed their deliberate judgment; that should the President and the Senate determine that the nominee for a judicial office was a man learned in the law, a judge and jury of the District of Columbia could revise their judgment and oust him from his position, because in their opinion the facts developed upon the trial failed to disclose such qualification; that if the President and Senate should determine where appointments were apportioned between different parties, that the appointee belonged to another party than that to which he was accredited, he could be ousted from his office; that if the President and Senate were obligated to pass upon the moral character or other qualifications of an office-holder, nevertheless the man so appointed might be ousted because of a finding of a jury that his moral or other qualifications were not such as the statute contemplated.

That in these proceedings the finding of the President and Senate, after careful examination into the qualifications under the law, or this petitioner, has been treated as not even of evidential, much less conclusive, value; that in the conclusions so far reached in this case, a dangerous precedent has been created as to the extent to which the judiciary may revise and reverse the deliberate conclusions of other branches of the Government upon a mixed question of law and fact, that of residence, and that if it be permitted to stand, serious antagonisms will arise in the exercise of the several functions of the supposedly co-ordinate branches of our Government, and to obtain a clear and well-defined basis for the further operations of the appointing power and the limitations, if any, under which such power must act, it is of the highest possible importance that a final adjudication should be had at the hands of this honorable court.

Wherefore your petitioner prays that a writ of certiorari be issued out of and under the seal of this honorable court,

directed to the Court of Appeals of the District of Columbia, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings in the said Court of Appeals in the case entitled Oliver P. Newman, Appellant, *vs.* United States to the use of William J. Frizzell, Appellee, being No. 2741, to the end that the said case may be reviewed by this court, as provided by law, and that the judgment of the said Court of Appeals of the District of Columbia, and of the Supreme Court of the District of Columbia, as set forth in said cause, may be reversed by this honorable court.

And your petitioner will ever pray.

OLIVER P. NEWMAN.

JACKSON H. RALSTON,
WM. E. RICHARDSON,
GEO. W. HOTT,
Attorneys.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Oliver P. Newman, being first duly sworn on oath deposes and says that he has read the foregoing petition for certiorari by him signed, and knows the contents thereof; that the same is true as to his own knowledge, except as to the matters and things therein stated upon information and belief, and that as to the same he believes it to be true.

OLIVER P. NEWMAN.

Subscribed and sworn to before me this — day of January, A. D. 1915.

———,
Notary Public, D. C.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1914.

NO. —.

OLIVER P. NEWMAN
vs.
UNITED STATES OF AMERICA *ex Rel.* WILLIAM J. FRIZZELL.

JOSEPH W. BAILEY,
ARTHUR A. BIRNEY,
WILLIAM J. NEALE, and
C. C. LANCASTER, Esqs.,
Appellee's Attorneys, Washington, D. C.:

Notice is hereby given that upon the petition of Oliver P. Newman, appellant in the above case, and that upon all pleadings and proceedings we shall, on ————, the —— day of January, A. D. 1915, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, copy of which is hereby served upon you, to the Supreme Court of the United States, at the Capitol, in the city of Washington.

JACKSON H. RALSTON,
WM. E. RICHARDSON,
GEO. W. HOTT,
Petitioner's Attorneys.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

Service accepted this —— day of January, A. D. 1915.

—— ——.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1914.

NO. —.

OLIVER P. NEWMAN
vs.
UNITED STATES OF AMERICA *ex Rel.* WILLIAM J. FRIZZELL.

Now comes Oliver P. Newman, by J. H. Ralston, W. E. Richardson, G. W. Hott, John W. Davis, and Conrad H. Syme, counsel, and moves this honorable court that it shall by certiorari or other proper process, directed to the honorable justices of the Court of Appeals for the District of Columbia, require the said court to certify to this court for its review and determination, a certain cause in said Court of Appeals lately pending, wherein said Oliver P. Newman was appellant and the United States, upon the relation of William J. Frizzell was appellee, being No. 2741, and to that end now tenders herewith his petition, together with a certified copy of the entire record in said case in said Court of Appeals.

JACKSON H. RALSTON,
WM. E. RICHARDSON,
GEO. W. HOTT,
Petitioner's Attorneys.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

(27478)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No.

OLIVER P. NEWMAN

vs.

UNITED STATES OF AMERICA EX REL. WILLIAM J. FRIZZELL.

BRIEF ON PETITION FOR CERTIORARI.

Statement of Facts.

The petition for certiorari (pages 2-8) presents so fully the statement of facts that it has not been deemed necessary by petitioner's counsel to restate it here. They, therefore, confine themselves to incorporating such statement of facts herein by reference.

Errors upon Which Certiorari is Prayed.

Certiorari is prayed because the trial court, as well as a majority of the Court of Appeals, erred in their conclusions of fact, and the trial court, as well as a majority of the

Court of Appeals, further erred in their conclusions of law, as shown by erroneous exclusion of evidence offered to support this petitioner's contentions, instructions, and refusal of instructions to the jury, overruling all motions in arrest of judgment, and for judgment *non obstante veredicto,* and in the conclusions of law, as expressed by the opinion of the Court of Appeals herein, as well as in the original granting of leave to file the petition for *quo warranto,* among other things, in the following respects:

1. They failed to limit the right to bring *quo warranto* proceedings against a public officer of the Attorney General and the United States attorney for the District of Columbia.

2. They recognized the right of an assistant United States district attorney, in the absence of the United States district attorney and without instructions from him, to grant or refuse permission to bring *quo warranto* proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and taxpayer in the District of Columbia as an interested person within the meaning of the statute governing *quo warranto,* and therefore authorized to bring such proceedings, the Attorney General and an assistant district attorney having refused to bring them.

4. They recognized the right of a judge and jury to revise and reverse the findings of the President and Senate upon a question of fact governing qualifications for an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a

thorough examination into his qualifications and a determination that he was qualified under the law.

6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statement in substance of the facts as he had narrated to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge in not instructing the jury in effect that they were required to presume that the official acts of the President and the Senate in nominating and confirming respondent to the office of Commissioner were regular and proper, and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

10. In not reversing the action of the trial court in overruling the motions for judgment *non obstante veredicto* and in arrest of judgment.

ARGUMENT.

I.

The courts have no right to revise and review the determination of the President and Senate with relation to a question of fact which it was their duty under the law to determine.

In the present case the great issue offered is as to whether, the President and Senate having determined after an investigation of the facts that petitioner was within the meaning of the law a resident of the District of Columbia for three years before his appointment as a Civil Commissioner and had not during such time claimed residence elsewhere, a court and jury could revise and reach a conclusion adverse to that of those constitutionally and otherwise charged with the duty of determining such qualifications.

It is the feeling of the petitioner that, assuming for the sake of argument that he may not have a right of direct appeal by way of writ of error, nevertheless the questions presented by the record herein are so important and so deeply affect the framework of our Government that they should be passed upon and receive the final answer at the hands of this honorable court.

The petitioner believes that, under the position taken by the trial court and the majority of the Court of Appeals after the President and Senate had carefully examined into and passed favorably upon a candidate for office as meeting all legal requirements, such determination should be regarded as final, and that any other point of view would be disastrous. For instance, should the President and Senate determine that the nominee for judicial office was a man learned in the law, a judge and jury of the District of Columbia ought not to have the right to determine that he

was unlearned and unfitted for the appointment; if the President and Senate were charged with the duty of apportioning appointments between members of different parties, a court and jury ought not to revise their judgment, and find as a fact that the law had been violated or that the places would not belong to the parties to which in the appointments they had been accorded; if the President and Senate were obliged to pass upon the moral character or other qualifications of an officeholder, again such determination should be final without being subjected to the revision attempted to be made in the pending case.

In the present case petitioner Newman sought to establish by proof that substantially the same statements as to his qualifications had been made to the President and offered to the Senate as were produced as evidence before the jury, and that they had determined in his favor. All of this evidence was refused by the trial court, which declined to recognize the examination into petitioner's qualifications by the President and Senate as having even evidential, much less conclusive, value. In this manner, we submit, a dangerous precedent has been created as to the extent of the power of the judiciary to revise and reverse by the deliberate conclusion of co-ordinate branches of the Government upon a mixed question of law and fact, that of residence.

In the consideration of this case we have the aid of some authorities giving suggestive sidelights. The direct exact question never has been passed upon. The fact that so many years have passed by since the institution of this Government, and it has never been thought by any lawyer, so far as the records inform us, that a jury could revise a presidential and senatorial selection, is a strong argument against the soundness of such an idea.

We desire, without making any elaborate brief, to submit to this court such authorities as have seemed to us to indicate the general trend of judicial authority, premising, as we have, that broad declarations of opinion are lacking, for

the very natural reason that never before has the authority vested in co-ordinate branches of the Government in this respect been challenged by the judiciary.

The first decision of the Supreme Court in which this question was discussed was that of Marbury *vs.* Madison, 1 Cranch, 137; 2 Law. Ed., 60, where an effort was made to compel the Secretary of State by mandamus to deliver a commission to Marbury who has been appointed by the President a justice of the peace for the District of Columbia. Charles Lee, Attorney General during the latter part of Washington's administration and throughout Adam's administration, appeared for Marbury, and in his argument before the Supreme Court, said (at p. 149):

> "The second point is can a mandamus go to a Secretary of State in any case? It certainly cannot in all cases, nor to the President in any case.
>
> "It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth that a mandamus to a Secretary of State is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the Constitution."

The court in an opinion by Chief Justice Marshall said (at p. 165):

> "If some acts [of heads of executive departments] be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.
>
> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he

is authorized to appoint certain officers who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive."

And at page 167:

"The power of nominating to the Senate and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion."

And again at page 170:

"Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation."

In the case of Dudley *vs.* James, 83 Fed., at page 349, the court said:

"It has been settled from the adoption of the Constitution of the United States, dividing the powers of government, into three departments, that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion. Whether or not the judiciary can control executive action, and to what extent, is most elaborately discussed in the case of Marbury *vs.* Madison, 1803, 1 Cranch, 137, and there the rule was indicated that the courts cannot, either by mandamus or otherwise, control executive action, where that action depended upon either the discretion or judgment of the executive officer; and it was only where the performance of the executive

act was *purely ministerial* that the court could intervene, either by mandamus or otherwise.

"This question has been again and again presented and considered by the court, and the rule first adopted never departed from."

In the case of Mississippi *vs.* Johnson, 4 Wall., 475; 18 Law. Ed., 437, on motion for leave to file a complaint, the court said:

"It was admitted on the argument that the application now made to us is without precedent; and this is of much weight against it. * * * The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained. * * *

"The Congress is the legislative department, the President is the executive department. Neither can be restrained in its action by the judicial department. * * * *

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court? These questions answer themselves. * * *

"But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us."

In Astrom *vs.* Hammond, Fed. Case 596, it was said:

> "The judiciary cannot exercise a revisory proceeding over executive duties. *In carrying a law into effect, the executive must necessarily construe it,* and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued. * * *
>
> "In all matters of discretion * * * it is clear that executive acts cannot, in any form, be drawn in question by the judicial power."

In the making of this appointment discretion was exercised, as to the person, and judgment as to his possession of the legal qualifications, and over such acts the courts have no power of control.

Noble *vs.* Union River Logging Company, 147 U. S., 165; 37 Law Ed., 123.

In the case of Keim, 177 U. S., 290, 293; 44 Law Ed., 774, the Supreme Court said:

> "The appointment to an official position in the Government even if it be simply a clerical position is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant, whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power."

The courts cannot revise a decision of a secretary of an executive department where the law authorized him to exercise discretion and judgment.

Decatur *vs.* Paulding, 14 Peters, 497; 10 Law Ed., 559.

A decision of the Land Department upon questions of fact is conclusive on the courts.

De Cambra *vs.* Rogers, 189 U. S., 119; 47 Law. Ed., 734.

In Reaves *vs.* Ainsworth, 28 App. D. C., 157, the court said, among other things:

> "It is not to be presumed that Congress considered that the decisions of the President when called upon to exercise judgment and discretion in the performance of duties devolved upon him should be reviewable."

Certain decisions remain to be cited in the line of the conclusion reached by Mr. Justice Anderson (Record, p. 19) "that the determination by the President and Senate as to the qualifications of the respondent was reached * * * in the exercise of a reasonable discretion, and accordingly their determination was final." We do not intend to review particularly all of the decisions cited by the learned judge. We refer, however, to Bates & Guild Company *vs.* Payne, 194 U. S., 106; 48 Law Ed., 894, concluding that the decision of the Post-Office Department—

> "rendered in the exercise of a reasonable discretion will be treated as conclusive."

In the case of Garfield *vs.* U. S. *ex Rel.* Goldsby, 211 U. S., 249 and 261, the limitations of the powers of courts to control executive action are clearly indicated, the court saying:

> "Since Marbury *vs.* Madison, 1 Cranch, 137, 2 Law Ed., 60, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial or are undertaken entirely without authority, which may become the subject of review in the courts."

This is followed by extracts from the case of Noble *vs.* Union River Logging Company, 147 U. S., 165, showing clearly that it is only where a plain official duty, requiring no exercise of discretion, is to be performed and a performance is refused that the person who will sustain personal

injury by such refusal may have a mandamus to compel performance.

In the case of Low Wah Suey *vs.* Backus, 225 U. S., 460; 36 Law Ed., 1165, it is said, referring to hearings before executive officers, that:

> "In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final."

We close this branch of the discussion by quoting from Black's Constitutional Law, 3d Ed., sec. 66, as follows:

> "The Constitution makes the President of the United States the repository of all the executive power of the nation, thus constituting him a separate department of the Government, not inferior to the others, but co-ordinate with them and independent of them. His acts and determinations, within the sphere of his constitutional powers, cannot be controlled, questioned or overruled by the legislative or judicial departments. He is invested with political discretion, and in the exercise thereof he is responsible to no other person or department of the Government. He also has such other incidental privileges and immunities as are necessary to enable him to exercise his powers and discharge his duties without interference or hindrance. In the exercise of his political powers he is to use his own discretion and is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive.
>
> "The exercise by the President of his executive powers can neither be commanded nor restrained by the ordinary process of the courts. Nor can the discharge of his executive duties be thus compelled or in anywise interfered with."

II.

Disregard by the courts below of presidential and senatorial action as without even evidential value in a quo warranto proceeding.

We have already alluded to facts upon which we now desire to enlarge. Was the trial court, and later a majority of the Court of Appeals, justified in refusing to admit in evidence the fact the President and Senate had considered before their action, substantially the same evidence as was produced before the jury, and further in their refusal to direct in effect that action by the President and Senate was furnished with all presumptions of regularity and propriety, and that all necessary requirements of law in relation thereto had been complied with (Record, p. 51, refused instructions 5, 6, and 7).

There is a presumption, so well known as to scarcely need the citation of authority, in favor of the regularity of all public acts. They are entitled to the benefit of a presumption of rightfulness, and this presumption should have been presented to the jury. It was not so presented, but the jury were left at their own free will to determine the issues. If this were a case where the President and Senate had acted without consideration of the objections subsequently raised, relating to Newman's residence, it might be suggested that there was no real expression of opinion on their part, but it appears throughout the record that the President and Senate had in mind the very objections subsequently passed on by the jury. They did act and did determine, and nevertheless the jury were permitted to redetermine these facts without any presumption in favor of the rightfulness of the existing status. We can conceive that if Newman had been a mere intruder, not acting under color of the law, no presumption would have existed resulting from his physical possession of the office, but such was not the fact. The judg-

ment of two co-ordinate branches of the Government had to be overcome, and this idea can well be expressed, as it was, by the language of the several prayers now under consideration.

A further subject of discussion under the assignments of error is whether the court should not have recognized as a rule of law applicable to the trial of the case that, if the evidence presented by the relator to the jury consisted exclusively of the same evidence which was before the President in making the nomination and before the Senate in confirming the nomination and that the case made by such evidence was one as to which men might reasonably differ in their conclusions, then the case should not have been submitted to the jury, but they should have been instructed to bring a verdict for the defendant.

On the trial of the first appeal, the Court of Appeals held substantially that the court had jurisdiction to entertain the relator's petition and to determine whether as a fact the residential requirement of the act of Congress was fulfilled by the respondent. The question then determined was one of jurisdiction. The allegation that respondent did not fulfil this condition was admitted by the demurrer.

The question we are now arguing is not of jurisdiction, but of the application of a rule of decision which is in the nature of a rule of evidence based upon principles of comity and public policy. While it may be impossible to find a case in every respect identical with the present, the rules adopted by our courts in cases having a very direct parallel clearly recognize the adoption of such a rule of decision. Under these decisions it is impossible that the court should permit the action of the executive officers of the Government to be reviewed and reversed upon a question of fact by a jury upon th *same* evidence which was considered and passed on by the executive, where this evidence was such that reasonable men might decide the question at issue either for or against the respondent's eligibility. The court below definitely rec-

ognized this condition of the evidence in submitting the case to the jury, because, had the evidence been such that it could, to the reasonable mind, be subject to but one construction, it would have been the duty of the court to have issued a peremptory direction to the jury for or against the relator.

The record shows that relator testified before the Senate Judiciary Committee when his confirmation was under consideration. It also shows that the relator submitted his case, in so far as the question of residence was concerned, solely upon the evidence of the respondent. It also shows that the attorneys for the respondent endeavored to show that the testimony of the respondent, including the facts to which he had testified before the jury in this case, constituted the record upon which the President arrived at his decision making his appointment and the Senate in confirming it (Record, pp. 45 and 46). But the objection to these questions was sustained and the witness was not permitted to answer.

Whether it appears upon exceptions to the action of the court in refusing to permit this specific testimony to be admitted or whether the fact appears sufficiently from the exhibits to the petition and other portions of the record so that the court should have instructed the jury to bring its verdict for the respondent is immaterial, because in either event reversible error was, we submit, committed.

A line of decisions directly applicable to this proposition is found in the Court of Claims in the construction of the act of March 3, 1883, known as the Bowman act. The War Department, through the office of the Quartermaster General, exercised authority to settle claims for stores and supplies used by the Federal Army during the Civil War. These cases were presented on *ex parte* affidavits of the claimant and his witnesses. The complaints made to Congress of arbitrary action by the Department led to the passage of the act of Congress of March 3, 1883, giving the Court of Claims authority to investigate and report to Congress such claims as might be referred to that court by either

house of Congress or any committee of Congress. The Court of Claims, in a number of decisions, held that upon general principles of law it would not review or reverse the decisions of the Quartermaster General or the Secretary of War upon the same testimony which had been before those officers. The first case in which this rule was laid down was that of Calhoon *vs.* U. S., 24 C. C., 414, in which the testimony before the Quartermaster General consisted of depositions taken with an opportunity for cross-examination, so that they were admissible as evidence in the Court of Claims. Later, in the case of Small *vs.* U. S., 33 C. C., 451, the rule was extended and applied to a case wherein the evidence of the claimant and two witnesses had been submitted in affidavit form to the Quartermaster General. To prove his case before the Court of Claims the claimant and the same two witnesses testified and were cross-examined. The court held, however, that it was to be governed by the rule announced in the Calhoon case, and that the production of the same witnesses, although their testimony might have been more extensive, was substantially the submission of the case upon the same evidence upon which it had been adversely decided by the Quartermaster General, and they, therefore, refused to consider the testimony.

The Court of Appeals below has considered a large number of cases wherein parties have sought to secure the review of decisions of the executive officers. In no case has it been decided that the court would refuse to afford relief in the case of the exercise of arbitrary power, which in effect was the substance of the decision of this court on the first appeal of this case. It has been uniformly held that the findings and decisions of the officers of the Government will not be reconsidered and reversed because of the different opinions concerning the same subject.

In the case of Fisher *vs.* U. S. *ex rel.* Grand Rapids Timber Company, 37 App. D. C., 436 (441), this court was considering a petition for mandamus brought to require the

Secretary of the Interior to issue a patent for certain lands as to which the relator's entry was claimed to have been confirmed by the proviso to section 7 of the act of March 3, 1891, by the expiration of two years without the filing of a protest or contest. It was admitted that certain action had been taken by the land officers to investigate the claimant's entry, and the question decided by the court below was whether this action was sufficient to constitute a protest or contest, the court arriving at a different conclusion than that which had been decided by the Secretary. In reversing this decision this court states:

> "If in the present case nothing had been pending at the expiration of the two years from the issuance of the final receipt and the Secretary had arbitrarily refused to issue a patent, we would have a very different case. But here, at the expiration of the limitation fixed by law, a case was pending challenging the right of the grantee of the entryman to a patent. It will not do in this proceeding to say that it would not amount to a protest under the law. That was for the Secretary to decide."

Other cases have arisen in the United States courts involving the validity of patents issued by the Interior Department, the validity of such patents being dependent upon the compliance in good faith with the legal requirements incident to the acquiring of public lands. In U. S. *vs.* Meeker, 50 Fed. Rep., 146, a patent issued under the Timber act was assailed on the ground that the land was not chiefly valuable for timber as required by the statute. After referring to the fact that witnesses of good repute had testified as to the character of the land involved—that there was no conflict in the evidence as to the facts, but the differences lay in their opinions and estimates—Judge Hanford states:

> "From the evidence, I conclude that the land is of such a character that honest persons capable of estimating the value of land for agricultural purposes or

for its timber, may honestly differ in their opinions upon the question as to whether said land is chiefly valuable for timber thereon and unfit for cultivation, or otherwise. * * * In the case at bar, the evidence leaves the issue in doubt; therefore, it is the duty of the court to uphold, rather than annul, the action of the Land Department in selling the land to the defendant."

In Diller *vs.* Hawley, 81 Fed., 651, the opinion of the Circuit Court of Appeals was delivered by Judge Hawley. The question arose upon the cancellation by the Land Department of an entry alleged to have been made for speculative purposes. In dismissing the bill the opinion states:

> "We are of the opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr."

The importance of this statement by the court is made manifest by the fact that in the course of the opinion the court had stated that, in the administration and disposition of public lands, the presumption is that all of the preceding steps required by law before the issuance of a patent had been observed and that the decisions of the Department upon the question of fact would be deemed conclusive.

III.

Other Points Involved in the Record.

We shall not discuss the other matters considered by the courts below as to which error is alleged. They refer largely to questions of evidence touching residence and its essential elements under the particular law applicable to this case. They also cover the relator's right as a private individual to bring such an action as is herein presented and other ques-

tions not now necessary to be enumerated. We have sought in this brief, while setting out these matters as error in the petition of certiorari, rather to enlarge on such phases as were more important for consideration when the application before the court was one for the granting of the writ, but we do not desire it to be considered for a moment that any of the other errors are to be regarded as abandoned.

All of Newman's rights were preserved at all times on the face of the record from the beginning of the suit until its final presentation before the Court of Appeals, as is evident from a perusal of the motion for judgment *non obstante veredicto* and the motion in arrest of judgment (Record, pp. 33-36).

We submit, therefore, that if it should be determined that a writ of error ought not to issue in the present case, nevertheless a certiorari should proceed, the questions herein being of the highest public importance in the administration of the affairs of this Government.

Respectfully submitted,

JACKSON H. RALSTON,
WM. E. RICHARDSON,
GEORGE W. HOTT,
Attorneys for Newman.

JOHN W. DAVIS,
CONRAD H. SYME,
Of Counsel.

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Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 813

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA *EX REL.* WILLIAM J. FRIZZELL, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS AND BRIEF.

JOSEPH W. BAILEY,
A. A. BIRNEY,
W. J. NEALE,
Attorneys for the Relator.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No.

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA *EX REL.* WILLIAM J. FRIZZELL, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO DISMISS.

Now comes the United States on the relation of William J. Frizzell, and, by his attorneys, moves to dismiss the writ of error herein, because nothing alleged or decided in this case gives this court authority to review, by writ of error, the judgment of the Court of Appeals of the District of Columbia therein.

A STATEMENT OF THE CASE.

The petition in this case alleged that the respondent, Oliver P. Newman, was nominated by the President to the office of a civil Commissioner for the District of Columbia on the 26th day of June, 1913, and his nomination having been confirmed by the Senate, he entered upon the duties of that office on the 19th day of July, 1913; that the law which establishes the existing form of government for the District of Columbia provides for a commission to be composed of one army officer and two persons to be appointed from civil life, and expressly declares that: "The two persons appointed from civil life shall at the time of their appointment be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else;" that the respondent had not been an actual resident of the District of Columbia for three years next preceding his appointment, had claimed residence elsewhere within that time, and was not therefore qualified for the office of a civil Commissioner of the District of Columbia; that the petitioner had requested the Attorney-General of the United States and the District Attorney for the District of Columbia to institute proceedings to test the right of the respondent to hold and exercise the office of a civil Commissioner for the District of Columbia, and that each in turn had refused to comply with that request.

The writ of *quo warranto* was issued, and on the return thereof respondent demurred to the petition and moved to quash the writ, both of which motions were granted. The case was then appealed by the relator to the Court of Appeals of the District of Columbia, which reversed the judgment of the court below and remanded the case for further proceedings. The respondent then answered, and the case was tried before a jury, as provided by law, and

the jury returned a verdict against the respondent. Upon that verdict a judgment of ouster was entered against the plaintiff in error, and he appealed the case to the Court of Appeals of the District of Columbia, which affirmed the judgment last mentioned. The plaintiff in error then applied to the Court of Appeals of the District of Columbia for a writ of error, which was denied him, and he then applied to the Chief Justice of this honorable court, who granted the writ of error upon the ground that there was a doubt in his mind.

ARGUMENT.

The petition for the writ of error predicates the right to it on the following provisions of section 250 of the Judicial Code regulating appeals and writs of error from the final judgments or decrees of the Court of Appeals of the District of Columbia:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

It would be an inexcusable waste of time to argue at length that the foregoing propositions are not applicable here, for the least reflection must satisfy any reasonable mind that neither of them, nor all of them together, touch the question on which this case was decided.

1.

The jurisdiction of the trial court was not in issue.

The District of Columbia Code expressly provides for a *quo warranto* proceeding, and confers jurisdiction over such cases on the Supreme Court of the District, in which this action was instituted, and before which it was originally tried. The trial court did not err in holding that Frizzell was a competent relator, but even if the decision in that regard had been erroneous it was an error to be corrected on appeal, and did not go to the question of the court's jurisdiction.

2.

"The validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States" was not drawn in question.

Neither the petition of the relator nor the decision of the court called in question the power of the President to appoint Newman, though both might have well done so, if that had been necessary. The question presented, and the question decided, was purely and only one of Newman's eligibility to the office which he then held and which he still holds. This is not, therefore, a case "in which the validity of any authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question."

Champion Lumber Co. *vs.* Fisher, 227 U. S., 445, 451-2.

Foreman *vs.* Meyer, 227 U. S., 453, 455.

Even the argument of the plaintiff in error does not go to the extent of involving the President's power to appoint, but rests entirely on the proposition that the President having nominated Newman to the Senate and the Senate having confirmed that nomination, the question of his eligibility was thus concluded, and the court had no right to inquire into it. If that were conceded, it would mean no more than that a presidential nomination when confirmed by the Senate raises a conclusive presumption of eligibility, and precludes judicial inquiry into the question. That involves, not the right of the President to act but, only the effect of his action.

3.

But even if it were true that the power of the President to appoint an ineligible person to the office of civil Commissioner for the District of Columbia had been drawn in question by the defendant, this writ of error ought still to be dismissed, because that issue is frivolous.

Certainly this court will never express, or even intimate, an opinion that the President can defy or ignore the law. Certainly a presidential appointment can raise no stronger presumption of eligibility than an election by the people, and the books are full of cases in which the eligibility of men who have been chosen by a direct vote of the people to fill important offices has been challenged, and that challenge has been sustained, sometimes on the question of age, sometimes on the question of residence, and sometimes on the question of citizenship. Indeed, so far as our information extends, this is the first time that anybody had ever ventured to say that after the law-making power had fixed the qualifications for an office, whether appointive or elective, the statutory requirements can be disregarded, and the courts are powerless to enforce them. Such a contention is so utterly unfounded that it does not present a substantial contro-

versy and cannot therefore serve as a basis for a writ of error to the Supreme Court.

Western Union Telegraph Co. *vs.* Ann Arbor R. R. Co., 178 U. S., 239, 243.
Lampasas *vs.* Bell, 180 U. S., 276.
Franklin *vs.* United States, 216 U. S., 559.
Rakes *vs.* U. S., 212 U. S., 55.
Fay *vs.* Crozier, 217 U. S., 455.

4.

"The construction of a law of the United States" was not drawn in question within the meaning of the Judicial Code.

The statute which prescribes the qualifications of a civil Commissioner for the District of Columbia was not enacted by Congress in pursuance of its general legislative power, but was enacted under its exclusive jurisdiction over the District of Columbia; and this court has held in American Security Co. *vs.* District of Columbia, 224 U. S., 491, that the right to a writ of error does not exist where the statute construed was one purely local to the District of Columbia.

It is respectfully submitted that the writ of error ought to be dismissed.

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Attorneys for the Defendant in Error.

Office Supreme Court, U. S.
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FEB 18 1915
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 813

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES EX REL. WILLIAM J. FRIZZELL,
DEFENDANT IN ERROR.

BRIEF IN REPLY TO MOTION TO DISMISS WRIT OF ERROR FILED BY DEFENDANT IN ERROR.

JACKSON H. RALSTON.
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Statement and Argument.

The statement of the case contained in the brief of the defendant in error perhaps is sufficient for the purpose of the present argument and need not be supplemented. The writ of error in the present case was applied for largely under the fifth and sixth clauses of section 250 of the Judicial Code of the United States, providing for appeals of writs of error from the Court of Appeals of the District of Columbia to the

Supreme Court of the United States, the subparagraphs in question reading as follows:

> "Fifth. In cases in which the validity of an authority exercised under the United States or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> "Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant."

The old law permitted an appeal from the Supreme courts of the Territories of the United States to the Supreme Court of the United States when there should be drawn "in question the validity of a treaty or statute of, or an authority exercised under the United States."

In the case of Clayton *vs.* The People, 132 U. S., 632; 33 L. Ed., 455, the question arose of a right of appeal by writ of error to the Supreme Court of the United States in a manner entirely similar to the manner in which it is presented in the pending case. It appeared that one Pratt had been appointed by the Governor of the Territory of Utah to the office of auditor of public accounts, this appointment being made pursuant to the organic act of the Territory providing for the appointment by the governor of all except certain local officers, but nevertheless the Territory had passed an act allowing the election of the auditor by the people, and the defendant and appellant, Clayton, had been so selected. *Quo warranto* proceedings were brought, therefore, for the benefit of Pratt, the appointed officer, against Clayton, the elected officer, and the contentions of Pratt were, on the demurrer of Clayton, sustained in the territorial courts. The case thereupon, by writ of error, went to the Supreme Court of the United States, and the Supreme Court said:

> "We have no difficulty in holding that the record before us presents a case in which there was drawn in question an authority exercised under the United States within the meaning of the second section.

> This authority was that exercised by the governor in the appointment of Arthur Pratt, acting upon the hypothesis that there was a vacancy in that office which he had the right to fill."

Again the Supreme Court said:

> "We are, therefore, very clear that as the Supreme Court of the Territory of Utah based its decision upon the power conferred upon the governor by the seventh section of the organic act of Utah to make appointments to office, this power was drawn in question and gives the defendant, Clayton, the right to have the judgment of this court upon it."

In the pending case, the matter drawn in question is the authority of the President to determine the qualifications of a man whom he appointed to office, and whom the Senate confirms. We submit that if the governor of a territory is an authority, acting under the United States, assuredly the President of the United States is no less such an authority.

We further invite attention to Clough *vs.* Curtis, 134 U. S., 361; 33 L. Ed., 945, in which case the matter brought before the Supreme Court was presented under a writ of mandamus, and the dispute arose between two conflicting legislatures of the then Territory of Idaho, and the court took jurisdiction, saying:

> "In each case is directly drawn in question, the lawful existence of those bodies as the Council and House of Representatives of the Territory, and consequently the authority which they have assumed, as the legislative assembly of the Territory, to exercise under the United States. * * * The case now before us is within the very letter of the act of 1885 because there is drawn in question the validity of an authority exercised under the United States."

We likewise submit that if the merits of a controversy between rival legislative bodies in a Territory presents a question arising under an authority of the United States, again

no less can the exercise of the powers by the President of the United States be such an authority.

We desire to add to the foregoing a reference to Pickering *vs.* Lomax, 145 U. S., 310; 36 L. Ed., 717. In this case the Supreme Court said:

> "The case raised the question of the validity of an authority exercised under the United States, viz., the authority of the President to approve the deed thirteen years after the execution, and the decision of the Supreme Court of Illinois was against its validity, so that the case is directly within the words of the statute."

We have further to invite the attention of the court to the case of Smoot *vs.* Hoyl, 227 U. S., 518; 57 L. Ed., 621, in which, quoting from the syllabus, it is said:

> "A suit to enjoin the maintenance of a party wall upon complainant's land, in which they challenge the validity, if applied to their land, as is insisted by defendant, of a building regulation promulgated by the Commissioners of the District of Columbia under the act of June 14, 1878 (20 Stat. at L., 131, chapter 194), is one in which, irrespective of the conclusion reached by the court below, there is drawn in question the validity of an authority exercised under the United States within the meaning of D. C. Code, section 233, governing the appellate jurisdiction of the Federal Supreme Court over the District of Columbia Court of Appeals."

It does not seem to us necessary in this connection to go so far as to consider whether the authority exercised by Newman is or is not an authority exercised under the United States. The basic question is whether the President of the United States and the Senate properly exercised their authority under the United States, the one in nominating and the other in confirming the appointment of Newman as Civil Commissioner of the District of Columbia.

The only case of which we have any knowledge which

may be assumed to be in any way in opposition to the position which we have taken is that of the American Security & Trust Company *vs.* Commissioners of the District of Columbia (224 U. S., 491; 55 Law. Ed., 856), relating to a matter of condemnation of land brought by the Commissioners under a special act, but the particular point related to a question of construction of a statute and not to a question of authority exercised under the United States, and it is, therefore, plainly distinguishable from the cases which we have cited, particularly in view of the fact that the Smoot *vs.* Heyl case is of later date.

While we have stated that the case of the American Security and Trust Company *vs.* The Commissioners of the District of Columbia was the only one of which we had any knowledge which might be assumed to be in opposition to the position we had taken, we recognize that the learned counsel for the defendant in error considered that the cases of Champion Lumber Company *vs.* Fisher, 227 U. S., 445, and Foreman *vs.* Mayer, 227 U. S., 453, offered such opposition.

After having given these cases full consideration we must adhere to our first opinion, and believe that counsel for defendant in error have misunderstood the cases in question with relation to their bearing upon the particular proposition involved in the present writ of error.

In the first case, Champion Lumber Company *vs.* Fisher, the only question for the court was whether the Secretary of the Interior had the power to determine if a certain paper constituted a protest. He so determined, and such determination was held not reviewable. The Supreme Court said:

> "The petitioner did not challenge nor did the court pass on the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute; that is, brought forward and made a ground of decision."

In the present case, Frizzell denied the right of the President to determine finally the qualifications of Newman for the office of Civil Commissioner, and the court held virtually that the determination of the President upon this question was not final. In other words, the "extent of the authority or duty of an officer of the United States" was "made a ground of decision." (See above citation from Pickering *vs.* Lomax.)

To make the present case follow within the lines of the Champion case, the court below would have had to decide that the President had the right to pass upon Newman's qualifications, and that his determination in such regard was not reviewable by the court. In the Champion case the court says that—

> "The petitioner's real attack upon the action of the Secretary and Commisioner was because the facts shown did not warrant the exercise of the power given by law."

In the present case the contention of the Petitioner, Frizzell, is in effect that no matter what the facts are, the determination of the President is reviewable by the courts, which may readjudge the same subject-matter.

In the second case cited, that of Foreman *vs.* Mayer, the court distinctly says that the only question before it was whether the petitioner "was or was not a paymaster's clerk entitled to be enrolled upon the register of the retired officers of the Navy." Naturally this did not offer any question as to the existence or scope of the power or duty of an officer of the United States.

We submit, therefore, that the motion to dismiss the writ of error must be overruled.

JACKSON H. RALSTON.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 813.

OLIVER P. NEWMAN, PLAINTIFF IN ERROR AND PETITIONER IN CERTIORARI,

vs.

UNITED STATES OF AMERICA *EX REL.* WILLIAM J. FRIZZELL, DEFENDANT IN ERROR AND RESPONDENT IN CERTIORARI.

BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER IN CERTIORARI.

Statement of Facts and History of Case.

On September 2, 1913, one William J. Frizzell filed in the Supreme Court of the District of Columbia his petition for *quo warranto* against plaintiff and petitioner (Rec., p. 4), setting up in brief that under the act of Congress approved June 11, 1878, there was provided a permanent form of government for the District of Columbia, directing that said District should remain a municipal corporation, and that

the President of the United States, by and with the advice and consent of the Senate, should appoint two citizens, with an army officer, to be the Commissioners of said District, and that the persons so appointed from civil life should serve for three years and until their successors should be appointed and qualified; that "the two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States and shall have been actual residents of the District of Columbia for three years next before their appointment and have during that period claimed residence nowhere else;" that on June 26, 1913, the President nominated to the Senate Oliver P. Newman as a Commissioner appointed from civil life; that said appointment was confirmed by the Senate; that on July 13, 1913, he took the prescribed oath and entered upon such office, and has ever since and yet holds the same; that he was not qualified in law to receive such office and has unlawfully assumed and usurped the said office, and is not lawfully entitled to the same or to exercise the functions and enjoy the emoluments thereof, because at the time of his appointment he had not been an actual resident of the District of Columbia for three years next preceding such appointment, and during such period he claimed residence elsewhere than in the District of Columbia, to wit, at Chicago, Illinois, and Princeton, New Jersey, as will appear from affidavits and his statement attached and prayed to be taken as part of said petition; that the petitioner was desirous that proper proceeding by *quo warranto* be taken to determine Newman's right to said office, and to that end had applied to the Attorney General and to the Attorney of the United States for the District of Columbia, and requested them to take such proceedings, but they had refused to institute the same; that copies of his letters to the Attorney General and the United States Attorney for the District of Columbia and of their answers thereto were attached and prayed to be read as part of the petition.

The petitioner, tendering himself ready to file a bond as provided by law, prayed leave of court to have the writ of *quo warranto* issue in the name of the United States, upon his relation against said Newman, requiring him to show by what warrant he held or exercised such office, and to answer the averments of the petition, and thereafter such proceedings should be had as were prescribed by law, and if it be found that he had usurped and intruded into or unlawfully held office, that he be ousted and excluded therefrom.

To the petition were attached the affidavit of George C. Montgomery that Newman had registered in New York on September 12, 1912, giving his residence as Chicago, Ill., and also the affidavit of C. C. Lancaster, that he had procured a copy of a lease he had entered into for premises in the Florence Court apartment house, and that he had examined the hotel register of the Hotel Shoreham, and found that said Newman was a guest from March 3 to March 5, and that the hotel register showed "Oliver P. Newman, Princeton, New Jersey"; also the affidavits of James M. England and Carlton W. Statton, that they had found that some time in the year 1910 letters addressed to Newman at the Westminster apartment house, in the District of Columbia, had been returned undelivered, and the further affidavit of James M. England that on an examination of the court records of the municipal court, he had found a marshal's return indicating that said Newman had left Washington to go into business in Chicago. Further, the affidavit of William J. Frizzell that he had examined the real estate and personal tax registers of the District of Columbia from July 1, 1908, to June 30, 1913, and had failed to find the name of said Newman, and had found his name in the Chicago City Directory for the year 1912, as reporter, living in said city, and that the City Directory of St. Joseph, Missouri, showed the entry of his name for the years 1908 and 1909, and the directory for 1910 had an entry that he had removed to Lincoln, Nebraska, and in the City Directory of

Lincoln, Nebraska, he had found his name for the year 1910.

There was also attached a lengthy statement made by this petitioner before the Senate Committee of the District of Columbia covering the question of his residence.

There was further attached a letter from Hon. J. C. McReynolds, Attorney General, declining to institute proceedings to test his right to hold the office of Civil Commissioner, with a letter from W. J. Frizzell, addressed to the United States Attorney for the District of Columbia, asking the institution of such proceedings, a letter signed by James M. Proctor, Assistant United States Attorney, in charge, under the heading of the office of the United States Attorney, District of Columbia, and dated October 23, 1913, acknowledging receipt of a letter requesting the institution of proceedings in *quo warranto,* and stating that the District Attorney was spending his vacation in Europe and would not return for a month, and that, acting in his stead, he (Proctor) declined to comply with the request.

This petitioner, through his attorneys, objected to the granting of leave to file the petition for the writ of *quo warranto,* said objections (Record, pp. 1 to 4) setting up the want of sufficient interest in said Frizzell to institute such proceedings; that the President and Senate had examined into and determined petitioner's qualifications for office, and that same could not be reviewed by any judicial authority; that relator had appeared before the committee of the Senate having the matter in charge and objected to such confirmation, but that said objections were unanimously overruled by the Senate committee, and could not be again reviewed; that the respondent had been found duly qualified by the President and Senate, and was so qualified; that his appointment was for the term of three years, during which time he was subject to removal by the President; that a writ of *quo warranto* would not lie in any instance where the appointee was at all times subject to removal by the appoint-

ing power; that no public interest would be subserved by the granting of the petition, but that the exercise of public functions would be hampered and interfered with by the granting of the permission prayed for; that official permission on the part of the Attorney General of the United States and the United States Attorney for the District of Columbia had been refused because no public interest would be subserved; that this petitioner verily believed that the petition was not filed in good faith, but at the instigation of persons unknown to the petitioner, whose animus should be the subject of inquiry and whose names and contributions should be fully disclosed, to the end that the process of the court might not be abused to serve private animosities or interests; that the whole procedure was an attempt to invoke an infringement by the judicial authorities upon the powers, responsibilities, and duties of the Executive and Legislative branches of the Government charged with the determination of the qualification of appointees to office, and whose conclusions were final as to such matters.

Nevertheless the justice of the Supreme Court of the District of Columbia, acting in the matter, granted leave to file said petition, to which this petitioner excepted and objected (Record, p. 15); that upon the issuance and service of the writ of *quo warranto* this petitioner, through his attorneys, moved to quash and at the same time, and without waiving the motion to quash, demurred to the petition (Record, pp. 17, 18, and 19), for reasons in substance repeated in the motion for judgment *non obstante veredicto* and in arrest of judgment, hereinafter referred to, and also in substance set out in the errors hereinafter enumerated.

Upon the hearing the justice of the Supreme Court of the District of Columbia having the matter in charge sustained the motion to quash the demurrer and dismissed the petition (Opinion, Rec., pp. 19-30), from which action the petitioner William J. Frizzell appealed to the Court of Appeals of the District of Columbia, and upon the hearing in said

Court of Appeals judgment and action in the Supreme Court of the District of Columbia was reversed, and the cause remanded for further pleadings and trial (Opinion, Rec., pp. 30—), whereupon this petitioner filed his answer and pleas (Record, pp. 31 and 32), in which, among other things, he denied that he was not qualified in law to receive such appointment, or had unlawfully assumed or usurped said office, or was not entitled to the same, or to exercise the functions and enjoy the emoluments thereof, and denied that he had not been an actual resident of the District of Columbia for three years next before the time of his appointment, and denied that he had ever claimed residence elsewhere than in the District of Columbia during said period of three years, although admitting that at various times he had other temporary business addresses. He denied that the petitioner had ever made legal application to the attorney of the United States for the District of Columbia prior to the proceedings, or that such District Attorney had ever refused to institute the same. He further stated that he was nominated by the President to the Senate as Civil Commissioner, duly confirmed, and took the prescribed oath on July 19, 1913, and has ever since held and yet holds such office, and that then and for three years theretofore he had been an actual resident of the District of Columbia, and during such period had claimed residence nowhere else. He averred that he was duly qualified to be appointed Civil Commissioner when appointed, and that such appointment was nominated to and confirmed by the Senate upon thorough review of his qualifications, which body determined that he was qualified therefor within the meaning of the statute, and such determination was final and conclusive; that he held the office in conformity to law, was duly qualified, had met all legal requirements, was lawfully entitled thereto, and denied that he had usurped or intruded into or unlawfully held the same, or had so done at any time before the commencement of the action or trial therefor. Thereafter a

trial was had and a verdict of the jury returned against this petitioner. A motion for new trial was filed and overruled. At that same time motions for judgment *non obstante veredicto* and in arrest of judgment were filed upon the following grounds:

1. That the power to determine the qualifications under the law of the respondent as Civil Commissioner of the District of Columbia rested primarily with the President and Senate, and as it appears from the petition that the advice and consent of the Senate was only given after a thorough examination into his qualifications and a determination that he was qualified, as appears from the petition, no power to review such action rests in any court or jury, and unless in any event the court could have charged the jury that there was no evidence at all tending to show the respondent's qualifications and justifying the Senate's action (and it could not and did not so charge) such a revision of the Senate's action by a court or jury would be a violation of the constitutional separation of the powers of government.

2. The relator in his petition does not show that he has such an interest in the writ that he was entitled to invoke the jurisdiction of this court, the Attorney General or United States Attorney for the District of Columbia alone, if any one, being entitled to bring the action.

3. That this respondent having been appointed a Civil Commissioner of the District of Columbia, as shown by the petition, by the President of the United States and confirmed by the Senate, their conclusions are final, and no power of review of his qualifications resides in any court or jury, and the exercise of such power would be an infringement upon the powers of a co-ordinate branch of the Government.

4. That the appointment of this respondent is for the term of three years, but that during such period of three years he is subject to removal by the President at all times, and that a writ of *quo warranto* will not run in any instance where the appointee is at all times subject to removal by the appointing power.

5. That the Attorney General of the United States

having refused to file the petition of *quo warranto* asked for by the relator, and his action being based upon the manifest fact that no public interest would be subserved in the prosecution thereof, such determination on his part was conclusive, the United States Attorney for the District of Columbia not having acted in a contrary sense.

6. That the relator has not shown any interest in the office itself as contemplated by the statute, and has, therefore, no interest upon which could be based any petition for *quo warranto* as herein granted.

7. That no inquiry was made by the court prior to the issuance of the writ as to the motives of the relator, which should have been had to determine whether the discretion of the court ought to be exercised to permit the filing of the petition.

8. That it does not appear that the United States District Attorney for the District of Columbia ever refused to institute this proceeding on the request of the relator, and said relator has, therefore, no right to institute the said proceeding on his own behalf.

9. That it does not appear from the petition that any public interest whatsoever was subserved by its filing and such a writ may not be used for private purposes.

These motions were overruled and judgment was given ousting this petitioner from his office; whereupon a bond, to operate as a supersedeas, was given and approved, and an appeal taken to the Court of Appeals. Upon the hearing in the Court of Appeals the judgment below was affirmed.

Assignments of Error.

Plaintiff in error further respectfully represents that the trial court, as well as a majority of the Court of Appeals, erred in their conclusions of fact and the trial court, as well as a majority of the Court of Appeals, further erred in their conclusions of law, as shown by erroneous exclusion of evidence offered to support this petitioner's contentions, instructions, and refusal of instructions to the jury, overruling all

motions in arrest of judgment, and for judgment *non obstante veredicto*, and in the conclusions of law, as expressed by the opinion of the Court of Appeals herein, as well as in the original granting of leave to file the petition for *quo warranto*, among other things, in the following respects:

1. They failed to limit the right to bring *quo warranto* proceedings against a public officer to the Attorney General and the United States Attorney for the District of Columbia.

2. They recognized the right of an assistant United States District Attorney, in the absence of the United States District Attorney, and without instructions from him to grant or refuse permission to bring *quo warranto* proceedings, such right and power being given by no statute.

3. They recognized a mere citizen and taxpayer in the District of Columbia as an interested person within the meaning of the statute governing *quo warranto*, and, therefore, authorized to bring such proceedings, the Attorney General and an assistant District Attorney having refused to bring them.

4. They recognized the right of a judge and jury to revise and reverse the findings of the President and Senate upon a question of fact governing qualifications for an office, determination of which was primarily submitted to the President and Senate.

5. They sustained the submission of the issues in this case to a jury when it appeared from the petition itself that the advice and consent of the Senate to the confirmation of the respondent as Civil Commissioner was only given after a thorough examination into his qualifications and a determination that he was qualified under the law.

6. They sustained the trial judge in refusing to submit to the jury the fact that the respondent had laid before the President a statement in substance of the facts as he had narrated to the jury.

7. They sustained the trial judge in not allowing the respondent to state to the jury the fact that he had appeared before the Senate Committee of the District of Columbia and made a statement relative to his legal qualifications for the office in controversy.

8. They sustained the trial judge in not instructing the jury in effect that they were required to presume that the official acts of the President and of the Senate in nominating and confirming respondent to the office of Commissioner were regular and proper and all necessary requirements of law in relation thereto had been fulfilled.

9. They sustained the trial judge in not instructing the jury that their verdict should be for the respondent.

10. In not reversing the action of the trial court in overruling the motions for judgment *non obstante veredicto* and in arrest of judgment.

ARGUMENT.

In the discussion of the several assignments of error, we may consider them as relating to certain general headings of at least major importance as follows:

Was the relator below an interested party within the meaning and intent of the statute?

Is a mere taxpayer an interested person, the contest being as to a public office?

Was it the intention of Congress that appointees to office, exercising their functions in the District of Columbia, should be subject to *quo warranto* at the suit of a District citizen or taxpayer?

Have the courts the right to review Presidential and Senatorial determination of the qualifications of an officeholder?

Did Newman possess the statutory qualifications of a Commissioner of the District of Columbia?

So stating the several questions to be discussed, let us proceed to the consideration of what seems to us the first proposition—

I.

Was the Relator Below an Interested Party Within the Meaning and Intent of the Statute?

While we shall argue the point somewhat at length later in this brief, we desire now briefly to invite the attention of the court to the language of the District Code bearing particularly upon the question of the necessity of interests in the person who invokes *quo warranto*. Under section 1539, the Attorney General or the District Attorney may institute the proceedings on his own motion or on the relation of a third person. The writ to be issued on the relation of the third person must be by leave of court to be applied for by the relator and upon the giving of a bond with sufficient security. By section 1540, it appears that not every person is entitled after a refusal of the Attorney General or the District Attorney to proceed, even though leave of court be granted, for the statute says:

> "After the Attorney General and District Attorney shall refuse to institute such proceedings on the request of a *person interested*, such person may apply," etc.

Again, in the same section, when a court allows the writ to issue, it may be in the name of the United States, "On the relation of such interested person." It, therefore, appears that the person who applied for the writ must be not simply a third person, but an "interested" third person, and the question which is, therefore, offered to this court for solution is whether a relator who, like Frizzell, described himself simply as a taxpayer and citizen is possessed of such interest as will justify the court in granting and permitting the issuance of the writ after the refusal of the Attorney General and District Attorney to proceed.

We believe that reasons of convenience, borne out by the

weight of authority as hereinafter shown and by the logic of the situation, demand that the interested person be not a mere taxpayer, whose interest cannot be differentiated from that of any other of the thousands of taxpayers in the District of Columbia, but should be that of a person interested in the office itself, and who will suffer, if a wrong disposition be made of the office, a loss peculiar to himself and not shared in by the whole mass of taxpayers. The present case, it will be borne in mind, is not that of a stockholder in a private corporation, but public and governmental in character. In this connection, we will review some of the decisions indicating that the only power of contest with relation to a public office rests with the legal representatives of the State, this position being taken by the courts even in the absence of the special word "interest" or "interested," and we will first discuss these broader decisions.

In the case of Commonwealth *vs.* McCarter, 98 Pa., 607, the statute provided that the writ might be issued "by any person or persons desiring to prosecute the same," and the court construed these words to mean that the person instituting the proceedings must have an interest in the office itself, and that it was not intended to let a private citizen prosecute for a public wrong; that they did not give a private relator such right when no individual grievance was involved. The court said:

> "It thus appears that the relators are mere private citizens, having no interest in the office of mayor nor any absolute title to be restored to their positions as police officers, in the event of the ouster of the respondent. * * *
>
> "We are clearly of opinion that the action of the court below in refusing the writ of *quo warranto* and discharging the rule to show cause, was right, and for various reasons. The remedy by *quo warranto* has been much considered, by this court, and the circumstances in which, and the persons by whom, it may be invoked, have been clearly defined. It was long ago held in the case of Commonwealth *vs.*

Burrell, 7 Barr, 34, that the writ would not lie at the suggestion of an individual against one holding the office of judge of the court of common pleas. Chief Justice Gibson, in the course of his very exhaustive opinion, carefully indicated that the clause in the second section of the act of 1836, which authorized the issuing of the writ on the suggestion 'of any person or persons desiring to prosecute the same' was not intended for the redress of a public wrong. * * *

"Of course, if the relator can show title to the office in himself he is entitled to the remedy. But here the relator does not pretend to claim the office for himself, nor that he has any interest in it. He was dismissed from service as a police officer by the respondent as mayor of the city, and apparently he seeks to punish the respondent for this act, by having him removed from his office. It is very clear the writ of *quo warranto* does not lie for such a person to accomplish such a purpose. * * *

"It is perfectly manifest that a mere spirit of personal revenge is the animating cause of the application for the writ; but courts do not administer their functions for the gratification of such motives and for that reason alone, we should feel it our duty to sustain the learned judge of the court below in refusing the writ."

In the case of Barnum *vs.* Gillman, 27 Minn., 466, it was held that a *quo warranto* will not be issued without the consent of the Attorney General upon information of a private party having no personal interest in the case distinct from the public to try the right of an incumbent of a public office to hold the same.

In State *vs.* Dahl, 69 Minn., 108, proceedings in *quo warranto* were instituted by a private person who was simply a taxpayer. He sought to oust a public stenographer who was also a member of the Legislature. The Attorney General refused to give his consent to bring the suit. In discharging the rule to show cause the court said:

> "The granting or withholding of leave to file an information in the instance of a private person rests in the sound discretion of the court and is not a matter of strict legal right.
>
> "When the Attorney General has refused to give his consent the case should be exceptional and one in which it clearly appears that the public interests require it to justify the court in overruling his judgment. * * *
>
> "These facts and the further fact that the petitioner asserts no invasion of his personal rights (is simply attempting to oust Dahl because he conceives that the law will permit him to do so), lead us to conclude that this is a case where in the exercise of a sound judicial discretion, we ought not to grant the petitioner leave to file the information."

In the case of People *vs.* Grand River Bridge Company, 13 Colo., 11, it was held that a demurrer was properly sustained to a complaint filed by a private citizen for the dissolution of a corporation under the Code provisions relating to "actions for the usurpation of an office or franchise," the general rule being that prosecutions for wrongs done to the public must be instituted by the State, through its properly authorized agents, while an individual can sue only for injuries peculiarly affecting himself. The court said (12, 13, 14):

> "It is averred in the complaint that the District Attorney of the proper district refused to bring the suit upon application, and therefore plaintiff claims the right to maintain the action as relator by virtue of the provisions of section 315 of the Civil Code, although it does not appear that he has any other or different interest in the result than such as he may have in common with all other citizens of the State. If the defendant corporation has violated the law, either by doing some forbidden act or by neglecting to do some act enjoined upon it, it is not every person who may call it to account for such violation. As a general rule, prosecutions for wrongs done to the public must be instituted by the State

through its properly authorized agents, while the individual can only sue for injuries peculiarly affecting him; and the provision of the Code permitting an action in the nature of a *quo warranto* to be brought by a purely private party, upon the neglect or refusal of the District Attorney to bring such action, must be construed with reference to this general rule. * * *

"In Commonwealth *vs.* Railway Co., 20 Pa. St., 518, the court said: 'A stranger who has no interest in a corporation except that which is common to every citizen cannot demand a judgment of ouster in a writ of *quo warranto*. * * * No mere stranger should be permitted to demand the forfeiture of a charter granted by the Commonwealth where the State herself does not demand it. She has a right to waive the forfeiture; and it is her interest, in many cases, to do so.

"It will be noted that the provision in reference to the person who may act as relator is as broad in the English statute as in our own. In fact, the statute of this and other States relating to actions for the usurpation of an office or franchise are generally modifications of this Statute of Anne, and the universal rule of decisions in all cases in which the action has been brought for the purpose of dissolving a corporation has been that the relator, to maintain the action, must have some interest beyond that common to every citizen, and further than this we are not concerned in this case."

High, Extr. Rem., sec. 654.
Murphy *vs.* Bank, 20 Pa. St., 415.

State *ex red. vs.* Smith, 32 Ind., 213.
State *vs.* Stein, 13 Neb., 530.

In a proceeding in *quo warranto* instituted by citizens to arrest the usurpation of a municipal corporation in which the Code provided that "an action may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party when any association or a number of persons shall act within

this State as a corporation without being duly incorporated," the court held that:

> "The action should be brought in the name of the State to comply with the letter of the Code and the Constitution. * * * Our conclusion is that the complaint does not state facts sufficient to constitute a cause of action in the plaintiff; that the facts set forth, if they show any cause of action, show a cause of action in the State; that the court has no authority to make the State a party plaintiff except upon the motion of the Attorney General, as the institution of any action by the State is entirely in his discretion in a case of this kind and he is not subject to judicial control in its exercise."
>
> Robinson *vs.* Jones, 14 Fla., 256.

Section 7085, Compiled Laws of Michigan, 1872, provides that:

> "Any information in the nature of a *quo warranto* may also be filed by the Attorney General upon his own relation or upon the relation of any party on leave granted in certain cases. * * *
>
> "And it shall be the duty of the Attorney General whenever he shall have good reasons to believe that the same can be established by proof, to file such information in every case of public interest; and also in every other case in which satisfactory security shall be given to indemnify the people of this State against all costs and expenses incurred thereby."

In the case of The People *ex rel. vs.* The Attorney General, 41 Michigan, 728, the relators tendered the Attorney General the proper security, but he declined to institute the proceedings against a railway corporation because a legislative committee had reported in favor of said corporation. The court said:

> "The Attorney General is said to insist that he has a discretion not to file information on application of a relator unless he has reasons to believe that a case can be made out, nor even then unless the proceed-

ings can benefit the relator in a legal point of view.

"We think the same discretion applies to cases on relation as to other cases under this section and the fact which he relies on that a legislative committee reported in favor of the regularity of the corporation would bear sufficiently upon the question of usurpation of these franchises * * * as to negative any idea that he had at all exceeded a proper discretion. Whether we could interfere in any case with it or not, we cannot unless clearly abused, which is not the case here."

In the State, etc., *vs.* Taylor, 208 Mo., 442 (proceedings in *quo warranto* by taxpayers to oust school directors), the prosecuting attorney refused to institute proceedings. Revised Statutes of Missouri, 1899, volume 1, section 4457, provides as follows:

"In case any person usurps, intrude into or unlawfully hold or exercise any office or franchise, the Attorney General of the State, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of *quo warranto,* at the relation of any person desiring to prosecute the same."

The court said:

"That the prosecuting attorney of a county in Missouri is charged with a high, present and discriminating duty in exhibiting an information in the nature of a *quo warranto;* and that he has such corresponding discretion to go or not to go on as his oath of office, his learning in the law, his sense of official fitness and justice may dictate to him * * * for, be it remembered, the State is the reservoir of all power. * * * And it is fundamental that a private citizen may not intermeddle and that the State alone may inquire into the right of any person or corporation to usurp or intrude into the powers

of a governmental agency like a public office, or a party corporate for public purposes. * * *

* * * * * * *

"The usurpation of an office, though it frequently involves little else than private rights, is, in the eye of the law, a public offense. The only remedy is by an action in the name of the people. It is a public prosecution, instituted and conducted by the public prosecutor under his official obligation and responsibility. It is not the province of the court to control his discretion or authorize a private prosecutor to assume the office and in his name wield the power of a public prosecutor."

According to State *ex inf.* Folk *vs.* Talty, 166 Mo., 529, Joseph W. Folk, a circuit attorney, refused to exhibit an information in the nature of *quo warranto* and petition for mandamus was filed. Folk secured a writ of prohibition which was granted. The court said:

"If the statute is to be interpreted in accordance with the defendant's contention, the proceedings would be at the mere will or caprice of any person in position to prosecute it and the Attorney-General, circuit or prosecuting attorney, as the case might be, a figurehead and mere non-entity, and we are unable to believe that any such state of affairs was ever contemplated by the legislature. The power of determining whether the action shall be commenced must exist somewhere, and from the very nature of the writ, its character and purposes, it should rest with the officer who represents the people of the State with respect to such matters. * * *

"The office of the Attorney General (and the same may be said of the Prosecuting Attorney) is a public trust. It is a legal presumption that he will do his duty; that he will act with strict impartiality. In this confidence he had been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is, in its nature, a judicial act, from which there is no appeal, and over which the courts have no control."

Section 1, chapter 112, Hurd's Revised Statutes of 1905 (Illinois), provides:

> "That in case any person shall usurp, intrude into or unlawfully hold or exercise any office or franchise or any office in any corporation created by authority of this State * * * the Attorney-General or State's Attorney of the proper county, either on his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction * * * for leave to file an information in the nature of *quo warranto* in the name of the people of the State of Illinois."

In the case of The People *ex rel.*, etc., *vs.* Healy, 230 Ill., 280, the court held that where a petition in proper form with affidavits making out a *prima facie* case involving a private right or grievance distinct from that of the public at large, the said officer may be compelled to sign and present the petition, but that in matters which are in fact prosecutions by the people, which involve no individual right or grievance of the relator, the Attorney General or State's attorney has a discretion in determining whether the petition shall be presented to the court and such discretion cannot be controlled.

> "The discretion possessed by the Attorney General at common law is no doubt now possessed by the Attorney General or State's attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievances of the relator. *One such case is where the wrong is the usurpation of an appointive public office, to which, in the event of judgment of ouster, no particular individual will have a right to succeed.*"

In the case of Thompson *vs.* Watson, Attorney General, 48 Ohio State, 552, the plaintiff alleged that he was an elector of the State, and that he requested the Attorney General to commence an action in *quo warranto* to test the con-

stitutionality of a statute, which he declined and refused to do. The court said:

> "He (Attorney General) may in a proper case upon his own relation bring such action or he may bring it on leave of the court or a judge in vacation on the relation of another person. Revised Statutes, 6565. He does not ask leave to bring the action and an application of another person to him to bring it on his own relation is addressed to his discretion, the exercise of which the court cannot control. If he refuses it must be presumed that his refusal is based upon sufficient cause."

In the case of Everding *vs.* McGinn, 23 Oregon, 15, the court held that the proceedings to try the title to an office is a public prosecution instituted and conducted by the public prosecutor under his official obligation and responsibility and the court refused to interfere with the exercise of his discretion.

The statutes of New York provide that information in the nature of *quo warranto* may be filed by the Attorney General upon his own information or upon the relation of any private party. In the case of The People *vs.* The Attorney General, 22 Barbour, 114, the court refused to interfere with the discretion of the Attorney General.

> "The usurpation of an office, though it frequently involves little else than private rights, is in the eye of law a public offense. * * * It is a public prosecution instituted and conducted by the public prosecutor under his official obligation and responsibility. It is not the province of the court to control his discretion or to authorize a private prosecutor to assume his office and in his name wield the power of the public prosecutor."

In the case of Commonwealth *vs.* Burrell, 7 Pa. State, 34, the court held that proceedings in *quo warranto* to try the title to a public office would not lie except at the suggestion

of the Attorney General and that the remedy at the suggestion of individuals is confined to cases which are in the nature of private injuries. The court, among other things, said:

> "As a remedy for the usurpation of an executive office, or, in other words, an office which can be filled only by appointment of the Governor or by the voice of the people of the State, the statutory writ of *quo warranto* stands, as to everything but the form, as stood the writ of *quo warranto* at common law. The Commonwealth has her own officer for the protection of her own rights and as she has not explicitly allowed his office to be assumed by any one who may please to try his hand at the business of prosecution as his self-constituted *locum tenens*, we dare not assume the power of allowing it. * * * As the office of Attorney General is a public trust, which involves the exercise of an almost boundless discretion by an officer who ought to stand as impartial as a judge, it might be doubted whether even counsel employed by private prosecutor should be heard. * * * What impartiality is there to be expected from a private prosecutor flushed with the excitement of party victory or defeat? The officer acts under the obligation of an oath and at the peril of impeachment; a private prosecutor bears no obligation or responsibility at all; yet we are called upon, without any clear warrant, to let him wield at will the tremendous power of public prosecutor. * * * These are not the days to encourage individuals to snatch the reins from the constituted organs of the Government; and did the question before us even admit of a latitude of construction, I would certainly lean to the conservative side of it. Astounding results proceed from small beginnings; and we have already beheld appalling scenes enacted in our commercial emporium with impunity by men who took the law into their own hands in the name of the people. * * *
>
> "To deny the motion to quash would deprive the Attorney General of his official discretion, compel him to act against the dictates of his judgment, per-

> haps not, as in this instance at the bidding of a respectable lawyer, but at the bidding of the most ignorant and despisable man in the Commonwealth." * * *

The court further states that to decide the case otherwise would expose every officer to a writ of *quo warranto* at the suggestion of any person disobliged by him in discharging his duties.

> "As the judgment in a previous instance might not bar another prosecution by a new relator, incumbent might be plagued to death."

The statutes of West Virginia relating to proceedings in *quo warranto* are very similar to the law in the District of Columbia. In the case of the State *vs.* Matthews, 44 W. Va., 372, the court quashed the writ because the prosecuting attorney had refused to institute the proceedings.

In People *vs.* Lake Street Elevated Railroad Company, 54 Ill. App., 348, 363, the court says:

> "In all matters in which the public alone is concerned, the law had wisely placed the control of legal proceedings in its officers selected for that purpose and it is never admissible that these proceedings should be allowed to be used as mere instruments for the gratification of private malice or the attainment of personal and selfish aims. * * * The court below, in the exercise of its discretion, was authorized to take into consideration the circumstances showing the character of the proceedings and if satisfied, as we think it was justified in being, that the purpose was merely to allow a private party to institute proceedings in a matter concerning the public alone, it was not only within its discretion, but likewise its duty to refuse to allow the information to be filed."

II.

Is a Mere Taxpayer an Interested Person, the Contest Being as to a Public Office?

The chapter relating to *quo warranto* in the District Code contemplates in such cases as a private person may bring the action that he shall be an "interested person." While the Attorney General or the District Attorney may institute such proceeding on their own motion a third person must be "interested." Assuming, therefore, merely for the purpose of considering this point, that a third person, after refusal by the officials named, can himself use the name of the United States to bring any *quo warranto* proceeding involving a public office, we have to submit that he must not simply be interested in the general question, not simply be a taxpayer, but that he must be interested in the possession of the very office in dispute. This is the general language of the very large majority of the authorities dealing with the question, notwithstanding the fact that there are a few cases, usually based upon the particular language of the statute under which they are decided, following as to purely municipal offices the old English rule allowing a citizen of a municipality to be a party plaintiff. Usually statutes under which such proceedings were had allowed the suit to be brought by "any person," instead of any "interested person."

Let us review, therefore, some of the modern and apposite opinions:

In the case of Stein, 13 Nebraska, 529, the court said:

> "When a private person has no direct interest in the result of the action, it cannot be maintained by him because the public alone are interested. * * * As the information fails to state facts showing the relator's right to the office in question, it does not state facts to constitute a cause of action." * * *

In Demarest *vs.* Wickham, 63 N. Y., 320, which was a *quo warranto* proceeding it was said that the interest justifying action by private individuals must be more than that of another taxpayer.

In Miller *vs.* Palermo, 12 Kansas, 14, it was held that the interest sustaining a private person in bringing *quo warranto* must be peculiar to himself.

In Pennsylvania Commonwealth *vs.* Whistler, 11 W. N. C., 513, it was held that a taxpayer has no official interest to justify him in maintaining proceedings in *quo warranto* against an alderman.

We have cited elsewhere the case of Commonwealth *vs.* McCarter, 98 Pa., 607, where the statute providing that the writ might be issued "by any person or persons desiring to prosecute the same," the court construed these words to mean that such person must have an interest in the office itself.

Again, in the important case of Commonwealth *vs.* Cluley, 56 Pa. St., 272, the court said:

> "This court has construed the words 'any person or persons desiring to prosecute the same' to mean any person who has an interest to be affected. They do not give a private relator the writ in a case of public right involving no individual grievance."

In the case of the State *vs.* Mason, 14 La. Annual, 506, the court said:

> "It appears reasonable that no one but a person pretending to have a right to an office should be permitted to contest the right of an incumbent of that office. If every citizen be entitled so to do, then a hundred or a thousand writs of *quo warranto* could be sued out."

The statute in West Virginia relating to proceedings in *quo warranto* is substantially the same as the statute in force in the District of Columbia. In State *vs.* Matthews,

44 W. Va., 372, the court held that a person who was an opposing candidate for the office of sheriff and who received the minority of the votes cast at an election was not an interested person within the meaning of the statute and the fact that he was a "citizen and taxpayer" was likewise insufficient. After exhaustive and careful review and consideration of the statutes and decisions in other States, the court in a lengthy opinion said:

> "My conclusion, therefore, is that the weight of authority that I have been able to examine clearly indicates that a party to be entitled to file an information in the nature of a writ of *quo warranto* in a case like the one presented for our consideration must be interested otherwise than as a citizen and taxpayer. If it had been intended that any person could apply, without qualification, why was it thought necessary to add the word 'interested' in the statute? I conclude, therefore, that the demurrer was properly sustained by the court for want of a competent relator, and the judgment complained of is affirmed with costs and damages."

III.

Was it the Intention of Congress that Appointees to Office, Exercising Their Functions in the District of Columbia, Should be Subject to Quo Warranto at the Suit of a District Citizen or Taxpayer?

General Scope and Interpretation of Chapter 51, Code of the District of Columbia, in Relation to Quo Warranto.

In order to emphasize these considerations, we venture, at the risk of some repetition, to discuss the general scope and purpose of the statute under which this proceeding was brought (Appendix A). It will be found that this case involves far more than the right of the relator, Frizzell, to attack the present respondent. It raises the question

whether every officer of the Federal Government functioning in the District of Columbia may not be assailed in like manner from an equally irresponsible source.

Section 1538.—Relief is provided by the statute against four classes of offenders, to wit:

1. Those usurping, intruding into, or unlawfully holding or exercising within the District a franchise or public office, civil or military.

2. Those usurping, intruding into, or unlawfully holding or exercising within the District an office in any domestic corporation.

3. Those acting as a corporation within the District without being duly authorized.

4. Those exercising within the District any corporate right, privilege or franchise not granted by the laws in force in said District.

Throughout this section the words "within the District" are used to designate the place wherein the offense must be committed in order to give jurisdiction of the action; they qualify in each case the preceding verbs "usurp," "intrude into," "hold," "exercise" or "act," and not the succeeding nouns "franchise," "public office," etc. They have to do with the territorial *situs* of the offense, the *locus in quo*, and not with the governmental origin of the office, franchise or right in question.

This distinction becomes important in determining the scope of the act. Not only are there exercised within the District all those public offices forming a part of the Government of the municipal corporation known as the District of Columbia, but also all those public offices of the United States which are attached to the seat of government.

The Revised Statutes provide:

> "SECTION 1795. All that part of the territory of the United States included within the present limits of the District of Columbia shall be the permanent seat of government of the United States.
> "SECTION 1796. All offices attached to the seat of government shall be exercised in the District of Columbia and not elsewhere, except as otherwise expressly provided by law."

It is the usurpation of any or all these offices, therefore, into which the act gives the Supreme Court of the District of Columbia jurisdiction to inquire. It has as much right to entertain a proceeding by *quo warranto* against the head of one of the executive departments as against a member of the Board of Commissioners of the District, and may use the writ *mutatis mutandis* as freely as it does the writ of mandamus, for it must be remembered that the Supreme Court of the District of Columbia, like the circuit court of the District to whose power and jurisdiction it succeeds, is a court of general jurisdiction, having vested in it all the judicial power of the United States under the Constitution. (See *Kendall vs. United States,* 12 Pet., 524, 609.) In addition to those powers specifically conferred it possesses the same powers and exercises the same jurisdiction as the circuit and district courts of the United States (Code Dist. Col., sec. 61; *Benson vs. Henkel,* 198 U. S., 1).

These considerations make it appear that a correct interpretation of the remaining sections of the statute is a matter of the greatest general importance, and that the questions therein involved are by no means local in character or consequence.

Section 1539.—This section is a re-enactment on a broader scale of the statute of Anne (9 Anne, ch. 20, sec. IV, A. D. 170, Appendix B). It provides that the remedy given may be pursued against any of the wrong-doers previously

named by either the Attorney General or the District Attorney; presumably by the former in matters of broad general consequence, and by the latter in those cases of more purely local character. At their discretion these officers may proceed either upon their own motion or upon the relation of any third person (High Ex. Leg. Rem., 603-604). If the public interest is involved and the case seems sufficiently meritorious, the Attorney General or the District Attorney, proceeding upon his own motion, will accept full responsibility for the institution of the action and will incur on behalf of the Government all costs properly taxable to it. If, however, the matter seems to be one of private rather than of public right, as in the case of usurpation of office in a private corporation, when the Attorney General or District Attorney shall have refused to proceed, as they may, for the very good reason that no public interest is involved, then, with leave of court, the private citizen may become the relator, he furnishing such a bond as the court may require. Even when the Attorney General or a State's Attorney acts at the instance of a private individual, he must, as was said in People *vs.* North Chicago Ry. Co., 88 Ill., 537,

> "Act in his official capacity under a sense of official duty and not merely lend his name for the use of a private party."

In such a case the Attorney General or the District Attorney remains at all times in actual or potential charge of the litigation (2 Spelling Ex. Rem., sec. 1835, and authorities cited).

Section 1540.—Many of the statutes in *quo warranto* end (as do the common law and the statute of Anne) with no provision for the prosecution of the remedy, independently of the State's legal officer, by any class of relators. The present statute, however, gives to certain persons an additional right.

If the case presented seems so utterly devoid of public interest or legal merit that neither the Attorney General nor District Attorney is willing to assume responsibility, either entire or qualified, they may wash their hands of it as they would of any other unfounded complaint, no matter how keen the desire of third persons for action on their part. In that event there is an end of the matter unless the prospective relator can show some private right of his own to be affected; some interest *in the legal sense* for which he demands protection. When this appears he may, after refusal by the Attorney General and District Attorney, proceed with his own counsel and at his own cost, for which latter security must be given as above. But his right to proceed is dependent solely upon his showing of interest, and the words "person interested" in section 1540 describe a class certainly much smaller than the "third persons" referred to in section 1539.

In construing the section it must be remembered that, as above indicated, it is in derogation of the common law, for—

> "in the absence of statutory regulations, the common-law rule prevails, requiring the proceedings to be instituted in the name of the State by the Attorney General. A private citizen is not allowed to file an information in his own name and of his own volition, for the law does not contemplate the use of this remedy by individual citizens to redress wrongs of the State."
>
> *Osgood vs. Jones*, 60 N. H., 543 (holding a private citizen incompetent to proceed against an officer alleged to have been irregularly chosen).

Or, as said by this court in *Wallace vs. Anderson*, 5 Wheat., 291:

> "No writ of *quo warranto* can be maintained, but at the instance of the Government, and as this is a writ issued by an individual without the authority of the Government, it is the opinion of this court

that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise the office, to try the title to which the writ is brought."

See also High, Ex. Leg. Rem., §697;
Territory vs. Lockwood, 3 Wall., 236.

The rule, therefore, applies with full force that—

"Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied."

Ross vs. Jones, 89 U. S., 576-591 (holding that the words "Persons bound as security" are not to be extended to embrace indorsers.)

Of the words "person interested," as applied to suits or actions in general, no better definition can be given than that they describe only one who "has some legal right, or is under some legal liability that may be enlarged or diminished by the judgment of the court."

Hemmenway vs. Corey, 16 Vt., 225; *In re Clark's Estate,* 79 Vt., 62.

Or, as stated by Mr. Justice Daniel in his dissenting opinion in *State of Pennsylvania vs. Wheeling Bridge Co.,* 13 Pet., 518, 594:

"By all correct legal intendment, this term *party* is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law or in equity, the very description of whose relation to the case shall evince a total absence of legal or equitable claims upon the subject of litigation; a total absence, too, of recip-

> rocal duty or obligation with reference to those whose property and whose possession and enjoyment of that property, are sought to be affected. Whilst courts of justice, therefore, will enforce the convening of all whose interest can properly be adjudged, they will repel and even rebuke attempts to assail, or even to canvass, the rights and interests of others, by those who in effect concede the want of a legal or equitable title in themselves. Courts of justice take no cognizance of imperfect rights, or such as may be termed merely moral or incidental, as distinguishable from legal or equitable, even when the existence of the former may be clearly shown.

Or, as the same proposition is stated with even more direct bearing upon the ultimate question here involved by Mr. Justice Brown, in *Tyler vs. Judges of Court of Registration,* 179 U. S., 405, 406:

> "The prime object of all litigation is to establish a right asserted by the plaintiff, or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the suit personal to himself, and *even in a proceeding which he prosecutes for the benefit of the public,* as for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow-citizens."

See also *Georgetown vs. Alexandria Canal Co.,* 12 Pet., 91.

And it may be remarked in passing that the case of *Union Pac. R. R. vs. Hall,* 91 U. S., 343, so much relied upon by the relator here, cannot be treated as in any sense an abandonment of this sound and salutary rule. That was a proceeding in mandamus against a railroad company by certain shippers on its lines to enforce duties imposed upon it by statute. They were held to have a peculiar interest, of equal quality with that which sustained the

case of *Pennsylvania vs. Bridge Co., supra,* and the language of the court is to be carefully noted. It was said, pages 355-356 (italics ours):

> "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a *mandamus* to enforce a public duty, *not due to the Government as such,* without the intervention of the Government law officer. * * * There is also, perhaps, a reasonable implication that Congress, when they authorized writs of mandamus to compel the Union Pacific Railroad Company to operate their road according to law, did not contemplate the intervention of the Attorney General in all cases. The act of 1873 does not prescribe who shall move for the writ, while the Attorney General is expressly directed to institute the necessary proceedings to secure the performance of other duties of the company."

Nor in drawing analogies from proceedings by injunction or mandamus must there be overlooked the historic differences between these writs and the writ of *quo warranto.* The writ of injunction has always been a private remedy, and mandamus, while originally a prerogative writ, has now become nothing more than an action at law between the parties in which even the colorable presence of the State as party plaintiff is no longer necessary, at least in the District of Columbia.

Dancy vs. Clark, 24 D. C. Appls., 496.
Bundy vs. Darling, 25 D. C. Appls., 459.

On the other hand, while informations in the nature of *quo warranto* have lost their criminal character and become purely civil remedies, the State still maintains, at least with regard to public offices and franchises, its attitude as the person chiefly concerned, and the granting or refusal of the writ still lies in the discretion of its courts. High on Extraordinary Legal Remedies, secs. 603, 605, 697. The law still

frowns upon the use of this remedy by individual citizens to redress the wrongs of the State. This caution is vindicated by the fact that, while by injunction or mandamus specific acts may be restrained or compelled without disturbing the remaining functions of the Government, *quo warranto* strikes at the officer himself whose removal may paralyze, *pro tanto*, all governmental activity.

The section under discussion deals indiscriminately with proceedings against any one of the four classes of offenders previously named. Manifestly circumstances which would create a legal interest differ as widely as do the nature and character of the offense; but, in so far as a public office is concerned, we maintain that the statute gives no color whatever to the claim that those are "interested" who have no claim upon the office, its rights, privileges or emoluments, and no other concern therewith than such as is shared with all other citizens or taxpayers. The reasons for so saying are not only strong but compelling.

a. The Weight of Authority.

With reference to the right of a private relator having no claim or interest other than that shared by the general public to proceed by *quo warranto* against the holder of a public office, it must be admitted that there is conflict of decision, but instead of the weight of authority being, as the court below assumed, in favor of such right, there is no doubt that the current of American opinion, both legislative and judicial, is *overwhelmingly* to the contrary. In lieu of burdening this brief further with quotations from the decided cases, the result of an extended investigation of the subject is set forth in Appendix C, printed herewith; and since the remedy of *quo warranto* is largely governed by statutes, so much of the latter as bear upon the point at issue is set forth with the double purpose of aiding in the interpretation of the decisions

and evidencing the legislative view of the public policy involved.

It will appear from this appendix that in the States of Arkansas, California, Dakota (Territory), Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, a proceeding such as the present would not be entertained, unless we except the State of Wisconsin, where, contrary to the rule as to general offices, it is permitted by express language of the statute in the case of county and municipal offices.

A contrary view is apparently entertained in the States of Alabama, Connecticut, Georgia, Maryland (a State *sui generis* on the question), and New Jersey, and perhaps in Colorado, Iowa, and Louisiana, there being in the three States last cited some conflict in their own decisions.

It would serve no useful purpose to discuss these decisions with greater detail than is done in the appendix. The conflict between them will be found to arise largely from (1) verbal differences in the statutes construed; (2) the character and function of the various offices involved in individual cases; and (3) to some extent divergent views of public policy.

But it is noteworthy that with the sole exception of the State of Georgia, and possibly the latest decision in the State of Louisiana (*State vs. Kohnke,* 109 La., 838), in no State where the right is given by statute in express terms only to those "interested" or "claiming an interest," has a private relator been permitted to proceed without showing a peculiar interest or injury.

To the contrary are the States of Dakota (Territory), Indiana, Kansas, North Dakota, Oklahoma, Vermont, Vir-

ginia (*arguendo*), Washington, and West Virginia; while still broader language, such as "any citizen," "a private person," "any person desiring to prosecute the same," "any individual relator," and similar phrases have been held to exclude a person showing no special interest in the States of Illinois, Michigan, Minnesota, Missouri, New York, Pennsylvania, Texas, and Wisconsin.

To the statement that Georgia stands alone, or at best with Louisiana in her construction of the statutory word "interested," exception will be taken, and it will be insisted that the decision in *State vs. Barker*, 116 Iowa, 96, is to the same effect. Here a private relator was permitted to attack the appointment of water-works trustees of a city, basing his action upon the unconstitutionality of the acts under which they were appointed. The statute gives the right to bring *quo warranto* to "any citizen of the State having an interest in the question." The court was careful to state its reasons thus:

> "A private citizen and taxpayer is undoubtedly interested in the duties required of the several public officials who are authorized to levy taxes. This is not a contest over an office, as were many of the cases cited in appellees' brief, but a matter of public interest in which relator has a special interest by reason of being a contributor to the funds. * * * As we have said, *if this were a contest over the right to hold office, relator should have shown that he was elected or appointed to that office;* or if it had been an action to dissolve the corporation, perhaps he could not have maintained the suit. But it is neither, and under our statute there seems to be no doubt of his right to sue."

Counsel, we think, will search in vain for any further States supporting the construction which they seek to place upon the statute at bar, especially where, as here, the words "a third person" used in section 1539 are thrown into sharp contrast with the less inclusive phrase "a person interested" used in section 1540.

The question of public policy remains to be discussed, but in this connection attention should be called to the multitude of States which, not content to leave the matter for judicial interpretation, have expressly provided that the right to challenge the occupant of a public office should be extended only to those private citizens who are claimants to the same position. Such are Arkansas, Florida, Idaho, Kentucky, Mississippi, Montana, Nevada, Ohio, Utah, and Wyoming.

b. The character and functions of the office in suit.—In nearly all of the cases in which a "citizen and taxpayer" of a municipal corporation is permitted to attack the title of a municipal officer ,the court rests its finding of qualifying interest upon the fact that the officer in question has the right to lay, collect and disburse taxes, and the relator is thus affected in a property right through his contribution to the common fund. No such consideration can prevail here.

The District of Columbia bears but a remote resemblance to a typical municipality possessing an autonomous government, and the office of Commissioner of the District of Columbia is quite unlike that of the usual mayor or member of a common council. The Commissioners have no power to assess, levy or collect taxes, or to disburse them when collected, otherwise than as Congress may direct. They are merely the administrative agents through whom, under the Federal power, the government of the District is in part conducted. The relation which a citizen and taxpayer, or a citizen alone, of the District bears to them is no whit different *in essence* from that which he bears to all the officers of the Federal establishment—save only that as there are more citizens of the United States than there are citizens of the District of Columbia, his status in the former instance is shared by a larger number.

The relation borne by Newman to the General Government is *sui generis*. He is a part of it. To illustrate: With

the Chief of Engineers of the army the Commissioners are charged with the control of Rock Creek Park (26 Stats. at L., . 492, sec. 7). The Board of Commissioners controls the streets of Washington owned by the Federal Government. As President of the Board of Commissioners Newman is with the Secretary of War, the Attorney General, and Chairmen of the Senate and House Committees on Public Grounds, a commission to investigate titles to lands in the District of Columbia belonging to the Government (35 Stats. at L., p. 541, ch. 228, sec. 26). The Board of Commissioners are a Public Utilities Board (37 Stats. at L., 934).

c. *The public policy involved.*—In the matter of public policy, some courts incline to the view that, as the prime requisite of the State is a government administered in accordance with the law, every citizen has an equal right to its maintenance, and may call upon the courts to protect him therein by removing those officers who are not duly qualified; although it is fair to say that even the courts entertaining this view rarely extend it to other than municipal offices where a citizen and taxpayer is the complainant.

On the other hand, it is maintained, by a large majority of the courts, and, as we think, with far better reason, that while the conduct of government and the selection of its officers in accordance with organic law is a fundamental necessity, it is a right inherent in the entire body politic, and as such its vindication and defense may be more safely intrusted to those who act for the public at large than to the caprice of individuals; that when adequate provision has been made by the State for the test of such questions through its duly selected officers the abstract right of the individual is sufficiently safeguarded; and that the possible evils which may arise from the negligence of those charged with this duty are less to be dreaded than the constant interruption and disturbance of the functions of government which would follow if any and all of its officers might be daily haled into court by

the dissatisfied, the prejudiced or the malicious to defend their official titles. For if one citizen or taxpayer may sue, so may another, and it is not easy to see any reason in principle for granting the right to those who are both citizens and taxpayers, which does not apply with equal force to citizens alone. The number of such suits could be limited only by the vague power of public opinion or the refusal of the courts to be plagued with them. Men are not elected or appointed to public office to spend their time in lawsuits.

This latter is the historic attitude of Anglo-Saxon jurisprudence, and it is not to be inferred without great argument that Congress intended in the present statute to depart from it. Not only does the language of the act itself and the weight of authority tend to the contrary, but other considerations militate with peculiar force in the present instance against such a construction.

Against the intrusion of an unfit or unqualified man into this office and other offices within the purview of this statute safeguards unusual and unique are otherwise provided. He is to be appointed by the President of the United States by and with the consent of the Senate, the latter as a branch of the legislature presumably both informed and vigilant to see that the laws are properly construed and obeyed. If the President and Senate unwittingly err in the first instance, the President may exercise at any moment his power of removal. The occupant of the office may be challenged in the name of the United States by (1) the Attorney General or (2) the United States Attorney of the District of Columbia, and if either of these officers is not informed in the matter it is within the power of any private citizen to furnish him with such facts as would warrant a judicial inquiry. The occasion for action by an individual to enforce this purely public right can arise only when each and all of these high functionaries have fallen short of their duty.

Nor is this all. The scope of the act, as we have seen,

covers all public offices, civil or military, exercised within the District of Columbia, and in this category are to be found a major part, if not in number certainly in importance, of those offices which go to make up the executive branch of the Federal Government. If the present relator is competent to proceed against the respondent, he would be equally so in his character of citizen and taxpayer, or of citizen alone, against any officer of the United States so located. Or, indeed, since his interest is shared equally with all other citizens of the country, any one of the latter who might present himself before the Supreme Court of the District would have a like right to be heard. From such intrusive inquiry perhaps only the Congress, with its constitutional power to judge of the election and qualifications of its members, would be exempt. A construction of this statute which would lead to such chaotic consequences is certainly contrary to reason and good order.

It is no answer to suggest that these dangers would be minimized by the fact that to many offices no express qualifications have been attached by the statutes of their creation, and that there would be slight occasion to challenge the discretion of the appointing power. The possibility of attack upon any or all of them nevertheless exists; and on grounds not at all different in character from those here asserted, such diverse officers for instance as the members of the Interstate Commerce Commission, the Federal Reserve Board, the Federal Trade Commission, the chiefs of the bureaus of yards and docks, of steam engineering, of equipment and recruiting, of navigation and ordnance, of construction and repair, in the Department of the Navy; the Commissioner of Fish and Fisheries; the Solicitor General and assistant attorneys general; assistant surgeons, paymasters and engineers in the Navy; chaplains in the Army (if stationed within the District); visitors of the Naval Observatory; the Public Printer, and the regents of the Smithsonian Institution, might be called upon at any moment

by officious persons to defend their right to serve. (See foot-note, page 41.) The list might be indefinitely prolonged, even to the inclusion of the judiciary within the District, both Federal and local.

Section 1541. The learned justice who delivered the opinion on behalf of the majority of the Court of Appeals found himself, however, much impressed with the idea that as the offices of the District are appointive in character no contest for them as between rival claimants is possible. This is in fact the very core and turning point of his opinion. Thus he says:

> "That Congress did not intend to limit persons interested to those interested in the office, is manifest from section 1541, which specifically provides a different form of procedure 'on the relation of a person claiming the same office'. Had such been the intention of Congress, some reference would have been made therein to the preceding section. Indeed it may well be that the procedure in this section applies only to a private and not to a public office, for the reason that in this District, where all offices are appointive, there cannot be two claimants to a public office" (R., 84).

And again,

> "Congress was fully cognizant that the courts generally have held the words 'a person interested' or 'interested person' used in similar statutes, to embrace a citizen and taxpayer.* Congress, it must be assumed, realized that unless the words should be so interpreted, the statute would be meaningless; for since all officers are appointed in this District, no one, other than a citizen or taxpayer, could be a 'person interested' within the contemplation of the statute" (R., 92).

And again,

"All officers in the District of Columbia are appointed, none are elected as in the States. As was so clearly pointed out by the Minnesota Court in the

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In re Legislation authorizing Presidential appointments, by and with the advice and consent of the Senate, and prescribing the qualifications of the appointee.

1. THE INTERSTATE COMMERCE COMMISSION.

Sec. 8575* (Act Fem. 4, 1887, sec. 11, 24 Stat., 383):

*Section references throughout, unless otherwise indicated, are to the 1913 edition of the Compiled Statutes.

A commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. * * * *Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment.*

(The Hepburn Act of June 29, 1906—sec. 8, 34 Stat., 595—enlarged the Commission to consist of seven members, etc., declared that the qualifications "shall be as already provided by law," and that "not more than four Commissioners shall be appointed from the same political party.")

2. THE FEDERAL RESERVE BOARD.

Sec. 9793 (Act of Dec. 23, 1913, sec. 10):

A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members *ex officio*, and five members appointed by the President of the United States, by and with the advice and consent of the Senate. In selecting the five appointive members of the Federal Reserve Board, *not more than one of whom shall be selected from any one Federal reserve district*, the President shall have due regard to a fair representation of the different commercial, industrial, and geographical divisions of the country. * * *

The members of said board * * * *shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank. Of the five members thus appointed by the President at least two shall be persons experienced in banking or finance.*

3. THE FEDERAL TRADE COMMISSION.

——— (Act of September 26, 1914):

* * * That a commission is hereby created and established, to be known as the Federal Trade Commission, * * * which shall

case of State *vs.* Dahl, *supra*, we have here the anomaly that there cannot be found a person qualified to assert such an interest in any office as would authorize him to become relator for the enforcement of his private right thereto" (R., 92).

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be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. *Not more than three of the Commissioners shall be members of the same political party.* * * * No Commissioner shall engage in any other business, vocation, or employment.

4. CHIEFS OF NAVAL BUREAUS.

Sec. 628 (R. S., 421):

The chiefs of the several Bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections, respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list. * * *

Sec. 629 (R. S., 422):

The chiefs of the Bureau of Yards and Docks, of the Bureau of Equipment and Recruiting, of the Bureau of Navigation, and of the Bureau of Ordnance, shall be appointed from the list of officers of the Navy *not below the grade of commander.*

Sec. 630 (Act June 29, 1906, 34 Stat., 564):

The chief of the Bureau of Yards and Docks shall be selected from the members of the Corps of Civil Engineers of the Navy *having not less than seven years' active service.*

Sec. 633 (R. S., 423):

The chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy not below the grade of commander, and *shall be a skillful naval constructor.*

Sec. 635 (R. S., 424, as amended June 7, 1900, 31 Stat., 684, 702):

The chief of the Bureau of Steam Engineering shall be appointed from the line of officers of the Navy not below the grade of lieutenant-commander, and *shall be a skillful engineer.*

(This section, as enacted in the Revised Statutes, provided that the chief of the Bureau should be appointed from the chief engineers of the Navy.)

Sec. 637 (R. S., 425):

The chief of the Bureau of Provisions and Clothing (now known as Bureau of Supplies and Accounts) shall be appointed from the list of paymasters of the Navy of not less than ten years' standing.

5. THE COMMISSIONER OF FISHERIES.

——— (R. S., 4395):

There shall be appointed by the President, with the advice and consent of the Senate, *from among the civil officers or employees of*

The contingencies in which such a contest for an appointive office might arise are so numerous, and the reports so crowded with cases illustrating them that the attitude of the learned justice cannot be regarded as otherwise than an inadvertence, and his reasoning must fall with the premise which supports it.

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the Government, a Commissioner of Fish and Fisheries, who *shall be a person of proved scientific and practical acquaintance with the fishes of the coast.*

(This section has been amended; see sec. 901.)

Sec. 901 (R. S., 4395, as amended Jan. 20, 1888, 25 Stat., 1):

There shall be appointed (etc.) a person of *scientific and practical acquaintance with the fish and fisheries* to be a Commissioner of Fish and Fisheries. * * *

3. SOLICITOR GENERAL AND ASSISTANT ATTORNEYS GENERAL.

Sec. 516 (R. S., sec. 347):

There shall be in the Department of Justice *an officer learned in the law*, to assist the Attorney General in the performance of his duties, called the Solicitor General, who shall be appointed by the President, by and with the advice and consent of the Senate. * * *

Sec. 517 (R. S., 348):

There shall be in the Department of Justice three officers, *learned in the law*, called the Assistant Attorneys General, who shall be appointed by the President, by and with the advice and consent of the Senate. * * *

7. ASSISTANT SURGEONS, PAYMASTERS, AND ENGINEERS IN THE NAVY.

Sec. 2493 (R. S., 1369):

All appointments in the Medical Corps of the Navy shall be made by the President, by and with the advice and consent of the Senate.

Sec. 2494 (R. S., 1370, as amended May 4, 1898, 30 Stat., 380):

No person shall be appointed assistant surgeon *until he has been examined and approved by a board of naval surgeons, designated by the Secretary of the Navy, nor who is under twenty-one or over thirty years of age, inclusive.*

——— (R. S., 1371):

No person shall be appointed surgeon *until he has served as an assistant surgeon at least two years on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment by a board of naval surgeons designated by the Secretary of the Navy.*

(This section was superseded by a provision in the act of Feb. 13, 1897, 29 Stat., 526, which declares that assistant surgeons shall be promoted to passed assistant surgeons, and the latter to surgeons, subject to such examinations as may be prescribed by the Secretary of the Navy.)

Thus instances have occurred where the incumbent has been removed yet challenges the validity of the order of removal and of the appointment of his successor, as in *Wallace vs. Anderson, supra,* or *In re Parsons,* 150 U. S., 150, which latter was a contest over the offices of the United

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Sec. 2526 (R. S., 1378):

All appointments in the Pay Corps shall be made by the President, by and with the advice and consent of the Senate.

Sec. 2527 (R. S., 1379):

No person shall be appointed assistant paymaster *who is,* at the time of such appointment, *less than twenty-one or more than twenty-six years of age; nor until his physical, mental, and moral qualifications have been examined and approved by a board of paymasters appointed by the Secretary of the Navy, and according to such regulations as he may prescribe.*

——— (R. S., 1391):

Engineers shall be appointed by the President, by and with the advice and consent of the Senate.

——— (R. S., 1392):

No person *under nineteen or over twenty-six years of age* shall be appointed a second assistant engineer in the Navy; nor shall any person be appointed or promoted in the Engineer Corps *until after he has been found qualified by a board of competent engineers and medical officers designated by the Secretary of the Navy, and has complied with existing regulations.*

8. ARMY CHAPLAINS.

Sec. 1868 (Act Feb. 2, 1901, sec. 12, 31 Stat., 750, which supersedes R. S., 1121):

The President is authorized to appoint, by and with the advice and consent of the Senate, chaplains in the Army * * * with the rank, pay, and allowances of captains of infantry: *Provided,* That *no person shall be appointed a chaplain in the regular army who shall have passed the age of forty years, nor until he shall have established his fitness as required by existing law.* * * *

Sec. 1871 (R. S., 1123):

No person shall be appointed as regimental or post chaplain *until he shall furnish proof that he is a regularly ordained minister of some religious denomination in good standing at the time of his appointment, together with a recommendation for such appointment from some authorized ecclesiastical body, or from not less than five accredited ministers of said denomination.*

Sec. 1872 (Act March 2, 1899, 30 Stat., 979):

No person in *civil life* shall hereafter be appointed a chaplain *until he shall have passed satisfactorily such examination as to his*

States attorney and marshal; or where there has been an attempt to abolish an office, or alter the method by which it is to be filled, the legislation to this effect being contested, as in *Clayton vs. People of Utah*, 132 U. S., 632; or again where the term of an officer having expired, he is holding over until his successor be elected or appointed and qualified, and the election, appointment or qualification of his successor is in dispute, as in *Boyd vs. Thayer*, 143 U. S., 135; and while the case last cited had to do with the elective office of governor of Nebraska, the contingency is one to which the office now in question is peculiarly subject, since the official term of the Commissioners of the District is three years and until their successors are appointed and qualified (20 Stat., 102, ch. 180, sec. 2). Numberless other illustrations might be drawn both from Federal and State Reports,

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mental, moral, and physical qualifications as may be prescribed by the President.

9. VISITORS TO THE NAVAL OBSERVATORY.

Sec. 662 (Act March 3, 1901, 31 Stat., 1122):

There shall be appointed by the President, by and with the advice and consent of the Senate, *from persons not officers of the United States, a board of six visitors to the Naval Observatory, four to be astronomers of high professional standing and two to be eminent citizens of the United States.*

10. THE PUBLIC PRINTER.

Sec. 6971 (Act Jan. 12, 1895, 28 Stat., 603):

The President of the United States shall nominate and, by and with the advice and consent of the Senate, appoint *a suitable person, who must be a practical printer and versed in the art of bookbinding*, to take charge of and manage the Government Printing Office.

11. REGENTS OF THE SMITHSONIAN INSTITUTION.

Rev. Stat., sec. 5580:

The business of the institution shall be conducted at the City of Washington by a Board of Regents, named the Regents of the Smithsonian Institution, to be composed of the Vice-President, the Chief Justice of the United States, and the governor of the District of Columbia, three members of the Senate, and three members of the House of Representatives; together with six other persons, other than members of Congress, *two of whom shall be resident in the City of Washington; and the other four shall be inhabitants of some State, but no two of them of the same State.*

such as those in *Utah vs. Elliott*, 13 Utah, 200; *Kilpatrick vs. Smith*, 77 Va., 347; *Sanders vs. Belue*, 78 S. C., 171, or *State vs. Manson*, 105 Tenn., 232, but enough has been said to indicate the fallacy of the argument based upon such a postulate. With the recurrent changes in the appointing power, the system of appointments in recess and in term, and the ever-present possibility of legislative interference by Congress with the government of the District, he would be bold indeed who would declare that there could be no contest as between rival claimants for the appointive offices of the District.

This being true, it seems clear that the implication contained in section 1541 is exactly the reverse of that suggested by the Court of Appeals. Instead of its being limited by inference to contests for private office, it would appear that Congress, intending by the preceding section to extend to rival claimants for office, and to such claimants only, a remedy non-existent at common law, surrounded this remedy with the additional safeguard of requiring from the relator a statement of "the facts upon which he claims to be entitled to the office"; and that this was done to protect public servants not only from the assault of those making no pretense to the office whatever, but also of those claimants whose assertion of title was plainly frivolous. A similar clause led to a similar inference in *Mills vs. State ex rel.* Smith, 2 Wash., 566-572.

IV.

Have the Courts a Right to Review Presidential and Senatorial Determination of the Qualifications of an Office-holder?

In the preliminary objections, and in the motion to quash and the demurrer, later in the motion in arrest of judgment and motion for judgment *non obstante veredicto*, it was maintained by the respondent below that having

been appointed by the President of the United States and confirmed by the Senate, their judgment upon the question of fact relative to his qualifications was conclusive, but no power of review of the presidential selection resided in any court, and to exercise it would be to infringe upon the powers of a co-ordinate branch of the Government. These contentions were in substance sustained at length by Mr. Justice Anderson in his opinion on the motion to quash and demurrer, but overruled or disregarded in the subsequent proceedings by the Court of Appeals and by the trial court. It is our desire now only briefly to discuss some of the questions bearing upon the propositions and being more important in character.

The first decision of the Supreme Court in which this question was discussed was that of Marbury *vs.* Madison, 1 Cranch, 137; 2 Law ed., 60, where an effort was made to compel the Secretary of State by mandamus to deliver a commission to Marbury, who has been appointed by the President a justice of the peace for the District of Columbia. Charles Lee, Attorney-General during the latter part of Washington's administration and throughout Adams' administration, appeared for Marbury, and in his argument before the Supreme Court, said (at p. 149):

> "The second point is can a mandamus go to a Secretary of State in any case? It certainly cannot in all cases, nor to the President in any case.
>
> "It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth that a mandamus to a Secretary of State is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the Constitution."

The court in an opinion by Chief Justice Marshall said (at p. 165):

> "If some acts (of heads of executive departments) be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.
>
> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
>
> "In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive."

And at page 167:

> "The power of nominating to the Senate and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion."

And again at page 170:

> "Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation."

In the case of Dudley vs. James, 83 Fed., at p. 349, the court said:

"It has been settled from the adoption of the Constitution of the United States, dividing the powers of government into three departments ,that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion. Whether or not the judiciary can control executive action, and to what extent, is most elaborately discussed in the case of Marbury *vs.* Madison, 1803, 1 Cranch, 137, and there the rule was indicated that the courts cannot, either by mandamus or otherwise, control executive action, where that action depended upon either the discretion or judgment of the executive officer; and it was only where the performance of the executive act was *purely ministerial* that the court could intervene, either by mandamus or otherwise.

"This question has been again and again presented and considered by the court, and the rule first adopted never departed from."

In the case of Mississippi *vs.* Johnson, 4 Wall., 475; 18 Law Ed., 437, on motion for leave to file a complaint, the court said:

"It was admitted on the argument that the application now made to us is without precedent; and this is of much weight against it. * * * The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained. * * *

"The Congress is the legislative department, the President is the executive department. Neither can be restrained in its action by the judicial department. * * *

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the

> President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court? These questions answer themselves. * * *
>
> "But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us."

In Astrom *vs.* Hammond, Fed. Case, 596, it was said:

> "The judiciary cannot exercise a revisory proceeding over executive duties. In carrying a law into effect, the executive must necessarily construe it, and it is not for this or any other court to say that there is error in the construction, and a different course must be pursued. * * *
>
> "In all matters of discretion * * * it is clear that executive acts cannot, in any form, be drawn in question by the judicial power."

In the making of this appointment discretion was exercised as to the person and judgment as to his possession of the legal qualifications and over such acts the courts have no power of control.

> Noble *vs.* Union River Logging Company, 147 U. S., 165; 37 Law. Ed., 123.

In the case of Keim, 177 U. S., 290, 293; 44 Law Ed., 774, the Supreme Court said:

> "The appointment to an official position in the Government even if it be simply a clerical position

> is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant, wnether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power."

The courts cannot revise a decision of a secretary of an executive department where the law authorized him to exercise discretion and judgment.

Decatur *vs.* Paulding, 14 Peters, 497; 10 Law Ed., 559.

A decision of the Land Department upon questions of fact is conclusive on the courts.

De Cambra *vs.* Rogers, 189 U. S., 119; 47 Law. Ed., 734.

In Reaves *vs.* Ainsworth, 28 App. D. C., 157, the court said, among other things:

> "It is not to be presumed that Congress considered that the decisions of the President when called upon to exercise judgment and discretion in the performance of duties devolved upon him should be reviewable."

Certain decisions remain to be cited in the line of the conclusion reached by Mr. Justice Anderson "that the determination by the President and Senate as to the qualifications of the respondent was reached * * * in the exercise of a reasonable discretion and accordingly their determination was final." We do not intend to review particularly all of the decisions cited by the learned judge. We refer, however, to Bates & Guild Company *vs.* Payne, 194 U. S., 106; 48 Law. Ed., 894, concluding that the decision of the Post-Office Department—

> "rendered in the exercise of a reasonable discretion will be treated as conclusive."

In the case of Garfield *vs.* U. S. *ex rel.* Goldsby, 211 U. S., 249 and 261, the limitations of the powers of courts to control executive action are clearly indicated, the court saying:

> "Since Marbury *vs.* Madison, 1 Cranch, 137; 2 Law. Ed., 60, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial or are undertaken en- * * *

This is followed by extracts from the case of Noble *vs.* Union River Logging Company, 147 U. S., 165, showing clearly that it is only where a plain official duty requiring no exercise of discretion is to be performed and a performance is refused, that the person who will sustain personal injury by such refusal may have a mandamus to compel performance.

In the case of Low Wah Suey *vs.* Backus, 225 U. S., p. 460; 36 Law Ed., 1165, it is said, referring to hearings before executive officers, that:

> "In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final."

As opposing a fair parallel we refer to the opinion of the Supreme Court of Texas in *Seay vs. Hunt*, 55 Texas, 545, 558, in a *quo warranto* proceeding, saying:

> "* * * In this State it is settled law that the determination of the result of an election is a ques-

> tion of a political nature, and, therefore, one which it is competent for the law-making power to refer to other tribunals than the constitutional courts. Williamson *vs.* Love, 52 Tex., 335, and cases there cited. *On principle and authority the question of eligibility to office is one of a like nature, being one which the public welfare demands should be promptly decided prior to the induction into office of the party elected.* Speaking of this very question the Supreme Court of Pennsylvania say: 'Whenever the corporate law provides a mode of settling disputes therein without the intervention of the courts, that mode is deemed exclusive of the ordinary remedies, and the judicial authority is dispensed with because adequately supplied.' Duffield's Case, Brightly Lead. Cas. on Elections, p. 564; Commonwealth *vs.* Allen, 70 Pa. St., 465; People *vs.* Matzker, 47 Cal., 524; Trigg *vs.* State, 49 Tex., 667; Jones *vs.* Shaw, 15 Tex., 577; 1 Dillon on M. C., sec. 139 *et seq.* (italics ours).

The result was to hold that the determination by the city council on the eligibility of a candidate for municipal office was not subject to revision by *quo warranto*, just as in this instance we contend that the determination by the Senate of the United States is likewise final and conclusive.

We close this branch of the discussion by quoting from Black's Constitutional Law, 3d ed., sec. 66, as follows:

> "The Constitution makes the President of the United States the repository of all the executive power of the nation, thus constituting him a separate department of the Government, not inferior to the others, but co-ordinate with them and independent of them. His acts and determination, within the sphere of his constitutional powers, cannot be controlled, questioned or overruled by the legislative or judicial departments. He is invested with political discretion, and in the exercise thereof he is responsible to no other person or department of the Government. He also has such other incidental privileges and immunities as are necessary to enable him to exercise his powers and discharge his duties with-

out interference or hindrance. In the exercise of his political powers he is to use his own discretion and is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive.

"The exercise by the President of his executive powers can neither be commanded nor restrained by the ordinary process of the courts. Nor can the discharge of his executive duties be thus compelled or in anywise interfered with."

We have already reverted in this brief to the fact that a construction of the powers of the courts which would allow them to review and revise presidential action with regard to appointees to office would lead to sweeping results, placing at the disposition of the courts the final determination of the qualifications of a very large proportion of the more prominent office-holders whose duties happen to require them to remain and to operate in the District of Columbia.

Disregard by the Courts Below of Presidential and Senatorial Action as without Even Evidential Value in the Quo Warranto Proceeding.

Was the trial court, and later a majority of the Court of Appeals, justified in refusing to admit in evidence the fact the President and Senate had considered before their action, substantially the same evidence as was produced before the jury, and further in their refusal to direct in effect that action by the President and Senate was furnished with all presumptions of regularity and propriety, and that all necessary requirements of law in relation thereto had been complied with (Record, p. 51, refused instructions 5, 6, and 7)?

There is a presumption, so well known as to scarcely need the citation of authority, in favor of the regularity of all public acts. They are entitled to the benefit of a pre-

sumption of rightfulness, and this presumption should have been presented to the jury. It was not so presented, but the jury were left at their own free will to determine the issues. If this were a case where the President and Senate had acted without consideration of the objections subsequently raised, relating to Newman's residence, it might be suggested that there was no real expression of opinion on their part, but it appears throughout the record that the President and Senate had in mind the very objections subsequently passed on by the jury. They did act and did determine, and nevertheless the jury were permitted to redetermine, these facts without any presumption in favor of the rightfulness of the existing status. We can conceive that if Newman had been a mere intruder, not acting under color of the law, no presumption would have existed resulting from his physical possession of the office, but such was not the fact. The judgment of two co-ordinate branches of the Government had to be overcome, and this idea can well be expressed, as it was, by the language of the several prayers now under consideration.

A further subject of discussion under the assignments of error is whether the court should not have recognized as a rule of law applicable to the trial of the case that if the evidence presented by the relator to the jury consisted exclusively of the same evidence which was before the President in making the nomination and before the Senate in confirming the nomination and that the case made by such evidence was one as to which men might reasonably differ in their conclusions, the nthe case should not have been submitted to the jury, but they should have been instructed to bring a verdict for the defendant.

On the trial of the first appeal, the Court of Appeals held substantially that the court had jurisdiction to entertain the relator's petition and to determine whether as a fact the residential requirement of the act of Congress was fulfilled by the respondent. The question then determined was one

of jurisdiction. The allegation that respondent did not fulfil this condition was admitted by the demurrer.

The question we are now arguing is not of jurisdiction, but of the application of a rule of decision which is in the nature of a rule of evidence based upon principles of comity and public policy. While it may be impossible to find a case in every respect identical with the present, the rules adopted by our courts in cases having a very direct parallel clearly recognize the adoption of such a rule of decision. Under these decisions it is impossible that the court should permit the action of the executive officers of the Government to be reviewed and reversed upon a question of fact by a jury upon the *same* evidence which was considered and passed on by the executive, where this evidence was such that reasonable men might decide the question at issue either for or against the respondent's eligibility. The court below definitely recognized this condition of the evidence in submitting the case to the jury, because, had the evidence been such that it could, to the reasonable mind, be subject to but one construction, it would have been the duty of the court to have issued a peremptory direction to the jury for or against the relator.

The record shows that relator testified before the Senate Judiciary Committee when his confirmation was under consideraiton. It also shows that the relator submitted his case, in so far as the question of residence was concerned, solely upon the evidence of the respondent. It also shows that the attorneys for the respondent endeavored to show that the testimony of the respondent, including the facts to which he had testified before the jury in this case, constituted the record upon which the President arrived at his decision making his appointment and the Senate in confirming it (Record, pp. 45 and 46). But the objection to these questions was sustained and the witness was not permitted to answer.

Whether it appears upon exceptions to the action of the court in refusing to permit this specific testimony to be ad-

mitted or whether the fact appears sufficiently from the exhibits to the petition and other portions of the record so that the court should have instructed the jury to bring its verdict for the respondent is immaterial, because in either event reversible error was, we submit, committed.

A line of decisions directly applicable to this proposition is found in the Court of Claims in the construction of the act of March 3, 1883, known as the Bowman act. The War Department, through the office of the Quartermaster General, exercised authority to settle claims for stores and supplies used by tne Federal Army during the Civil War. These cases were presented on *ex parte* affidavits of the claimant and his witnesses. The complaints made to Congress of arbitrary action by the Department led to the passage of the act of Congress of March 3, 1883, giving the Court of Claims authority to investigate and report to Congress such claims as might be referred to that court by either house of Congress or any committee of Congress. The Court of Claims, in a number of decisions, held that upon general principles of law it would not review or reverse the decisions of the Quartermaster General or the Secretary of War upon the same testimony which had been before those officers. The first case in which this rule was laid down was that of Calhoon *vs.* U. S., 24 C. C., 414, in which the testimony before the Quartermaster General consisted of depositions taken with an opportunity for cross-examination, so that they were admissible as evidence in the Court of Claims. Later, in the case of Small *vs.* U. S., 33 C. C., 451, the rule was extended and applied to a case wherein the evidence of the claimant and two witnesses had been submitted in affidavit form to the Quartermaster General. To prove his case before the Court of Claims the claimant and the same two witnesses testified and were cross-examined. The court held, however, that it was to be governed by the rule announced in the Calhoon case, and that the production of the same witnesses, although their testimony might have been

more extensive, was substantially the submission of the case upon the same evidence upon which it had been adversely decided by the Quartermaster General, and they, therefore, refused to consider the testimony.

The Court of Appeals below has considered a large number of cases wherein parties have sought to secure the review of decisions of the executive officers. In no case has it been decided that the court would refuse to afford relief in the case of the exercise of arbitrary power, which in effect was the substance of the decision of this court on the first appeal of this case. It has been uniformly held that the findings and decisions of the officers of the Government will not be reconsidered and reversed because of the different opinions concerning the same subject.

In the case of Fisher *vs.* U. S. *ex rel.* Grand Rapids Timber Company, 37 App. D. C., 436 (441), this court was considering a petition for mandamus brought to require the Secretary of the Interior to issue a patent for certain lands as to which the relator's entry was claimed to have been confirmed by the proviso to section 7 of the act of March 3, 1891, by the expiration of two years without the filing of a protest or contest. It was admitted that certain action had been taken by the land officers to investigate the claimant's entry, and the question decided by the court below was whether this action was sufficient to constitute a protest or contest, the court arriving at a different conclusion than that which had been decided by the Secretary. In reversing this decision this court states:

> "If in the present case nothing had been pending at the expiration of the two years from the issuance of the final receipt and the Secretary had arbitrarily refused to issue a patent, we would have a very different case. But here, at the expiration of the limitation fixed by law, a case was pending challenging the right of the grantee of the entryman to a patent. It will not do in this proceeding to say that it would not amount to a protest under the law. That was for the Secretary to decide."

Other cases have arisen in the United States courts involving the validity of patents issued by the Interior Department, the validity of such patents being dependent upon the compliance in good faith with the legal requirements incident to the acquiring of public lands. In U. S. *vs.* Meeker, 50 Fed. Rep., 146, a patent issued under the timber act was assailed on the ground that the land was not chiefly valuable for timber, as required by the statute. After referring to the fact that witnesses of good repute had testified as to the character of the land involved—that there was no conflict in the evidence as to the facts, but the differences lay in their opinions and estimates—Judge Hanford states:

> "From the evidence, I conclude that the land is of such a character that honest persons capable of estimating the value of land for agricultural purposes or for its timber, may honestly differ in their opinions upon the question as to whether said land is chiefly valuable for timber thereon and unfit for cultivation, or otherwise. * * * In the case at bar, the evidence leaves the issue in doubt; therefore, it is the duty of the court to uphold, rather than annul, the action of the Land Department in selling the land to the defendant."

In Diller *vs.* Hawley, 81 Fed., 651, the opinion of the Circuit Court of Appeals was delivered by Judge Hawley. The question arose upon the cancellation by the Land Department of an entry alleged to have been made for speculative purposes. In dismissing the bill the opinion states:

> "We are of the opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr."

The importance of this statement by the court is made manifest by the fact that in the course of the opinion the

court had stated that, in the administration and disposition of public lands, the presumption is that all of the preceding steps required by law before the issuance of a patent had been observed and that the decisions of the Department upon the question of fact would be deemed conclusive.

V.

Did Newman Possess the Statutory Qualifications of a Commissioner of the District of Columbia?

The principal salient and undisputed facts relating to Mr. Newman's residence in Washington are, briefly stated, as follows: In the years 1901 and 1902 he spent over a year in the District, only abandoning it on account of his health. The first favorable opportunity for return presented itself in March, 1910. He accepted it and came to the District, at that time, with his wife and stepson, where he lived continuously until some time in July, 1911, a period of approximately sixteen months. He was then persuaded to accept employment elsewhere, designed to run over the approaching presidential campaign, but only so accepted it on the assurance that at the earliest possible moment he would be permitted to return to Washington, continuing the same general employment, but at the Washington office of the concern employing him. Under this arrangement he remained away from Washington from the middle of July, 1911, until the early part of November, 1912, having his headquarters part of the time at Chicago, and part of the ime at Seagirt and Princeton, N. J., on several occasions being in Washington; that at all times and to all of his friends he expressed his determination to return to Washington as quickly as possible, and he did so on March 3, 1913, continuously remaining in the District to the time of his nomination.

While his wife and stepson accompanied him to Chicago, they returned to Washington four months before he was able to return, although on several occasions he was with them in Washington.

At all times Mr. Newman had the fixed intention of regarding Washington as his home and of resuming physical presence in this District at the earliest possible day. The only possible acts which were construed as indicating a contrary intention were that his name appeared in a Chicago directory as residing there, which appearance occurred in some unexplained way, with which Mr. Newman had no connection, and that he registered himself occasionally as from Chicago (his business address), and was registered by some one in March, 1913, as coming from Princeton. At that moment his wife and stepson had the family home in Washington. The questions to be determined, then, are whether Newman, for a period of more than three years prior to his appointment, had an actual residence in Washington, and whether he had during said period claimed residence elsewhere.

"Residence" and "Domicile."

We shall consider first the meaning of the term "residence," together with the meaning and application of the collateral term "domicile," as this examination will shed some light upon the matter under discussion.

We obtain the following from the text-books:

> "A very common qualification in an officeholder is that of residence for a specified period prior to his election or installation. In this connection, the words 'residence' and 'domicile' are usually regarded as synonymous, the former being more often used by the legislatures, the latter by the courts." 23 Am. and Eng. Encyc. of Law, p. 331.
>
> "The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the

qualification of electors mean substantially the same thing, and one is an inhabitant, resident or citizen at the place where he has his domicile or home." Cooley's Consti. Limi., sixth edition, p. 754.

"Residence, when used in statutes, is generally construed to mean domicile. In fact, the great bulk of the cases of domicile reported in the American books are cases of statutory residence. This is especially true with regard to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce, probate, and administration, etc. With respect to these subjects, there is substantial unanimity in this country in holding statutory residence to mean domicile." Jacob's Law of Domicile, section 75, and cases cited.

In Goldsworthy *vs.* Aldrich, 14 R. I., 171, a case of *quo warranto* to oust a town councilman, it was said:

"He (the prosecutor) contends that the word 'residence' as used in sections 1 and 2 (constitution) means, not a home simply, but a place of actual habitancy or abode. It is true, without doubt, that the word 'residence' sometimes has the meaning which the prosecutor contends for, the word being sometimes used to denote merely habitancy as contradistinguished from domicile or home. But it is also true that the word is frequently used as a synonym for domicile or home. What the word means in said sections 1 and 2 is, therefore, for interpretation or construction. The constitution of Massachusetts confers the right to vote on every citizen who, being otherwise qualified, 'shall have resided within the Commonwealth one year and within the town or district in which he may claim a right to vote, six calendar months.' The judges of the Supreme Judicial Court of Massachusetts, construing this provision, held that the words 'shall have resided' meant the same thing as 'shall have had his domicile or home,' * * * and so the words 'having resided,' used in the constitution of Pennsylvania have been construed to mean the same as 'having had his domicile or home.' * * * The construction contended for by the prosecutor, if adopted, would lead to very embarrassing results."

The opinion then points out some of these embarrassing results, such as having his summer and winter residence in different parts of the State, and in some instances summer homes in other States. The opinion continues:

> "A construction which leads to such results is not to be adopted, if another construction which avoids them is admissible.
>
> "Our conclusion is that the word 'residence' used in the constitution in the two sections above cited is there used as an equivalent to home or domicile and is not intended to be understood in the restricted sense of actual habitancy or abode."

In 5 Metcalf (Mass.), 587, it was held that 'inhabitant' and 'resident' as used in the constitution of the State are equivalent to the familiar term domicile. A like holding was made in Fry's election case, 71 Pa. St., 302, it then being said:

> "The removal without intention permanently to reside elsewhere will not lose residence."

In the Matter of Dimock, 11 Misc. (N. Y.), 610, 613; 32 N. Y. Supp., 927, it was said:

> "In all cases where a statute prescribes residence as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word 'residence' is equivalent to the place of domicile of the person who claims its benefit."

In the case of Hannon *vs.* Grizzard, 89 N. C., 113, the relator was elected register of deeds and the county commissioners refused him admission to the office, on the ground that he was not a resident within the meaning of the constitution. The Supreme Court said:

> "Residence as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile, denoting permanent as distinguished from a temporary dwelling place.

> There may be a residence for a specific purpose, as at a summer or a winter home, or to acquire an education or some art of skill in which the *animus revertendi* accompanies the whole period of absence, and this is consistent with the retention of the original and permanent home with all its incidental privileges and rights."

In State *vs.* Savre, 113 Am. St. Rep., 452, 455, it is succinctly stated that residence is where one expects to return "when his present engagement ends."

One of the most important cases upon this general subject is that of People *vs.* Platt, 50 Hun., 454. The Governor of the State was authorized to appoint, by and with the advice and consent of the Senate, commissioners of quarantine "who shall be residents of the metropolitan district." The trial judge charged the jury that residence and domicile are, in the construction of this statute, identical and synonymous terms. The Supreme Court held that there was no error in so charging.

The court further said:

> "Residence, when used in the statutes, is generally construed to mean domicile. This is especially true with regard to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce, probate and administration, etc. With respect to those subjects, there is substantial unanimity in this country in holding statutory residence to mean domicile. A change of municipal domicile is a question of act and intention. On the one hand, mere absence from the former place of abode does not destroy domicile there; nor does presence at a place for temporary purposes fix domicile there.
>
> "No case has been cited to us where the question as to the meaning of the word 'residence' in a constitution or a statute has arisen, where the subject was the right to vote or the right to hold office, * * * in which the word 'residence' has not been held, without doubt, to be equivalent to domicile.
>
> "And, indeed, if this meaning of domicile is not

to be given to the word 'residence' in statutes upon this subject what meaning can be given?' Shall residence which is to give the right to vote, include a mere temporary stay, when the domicile remains elsewhere?"

Actual Residence.

The statute (20 Stat. L., 103) provides that the persons appointed Commissioners from civil life "shall have been actual residents of the District of Columbia for three years next before their appointment, and have during that period claimed residence nowhere else."

> "Actual residence, as used in the Civil Code (Kansas), sections 54 and 640, relating to divorce, does not mean the usual place of residence or the place where a person is in fact residing for the time being, but has substantially the same meaning as the term 'domicile,' having in contemplation a residence of a permanent and fixed character" (Carpenter *vs.* Carpenter, 30 Kans., 712).

Said sections are as follows:

> "SEC. 54. An action for a divorce may be brought in the county of which the plaintiff is *an actual resident* at the time of the filing of the petition."
>
> "SEC. 640. The plaintiff in an action for divorce must have been an actual resident, in good faith, of the State for one year next preceding the filing of the petition, and a resident of the county in which the action is brought at the time the petition is filed."

The facts in the case were as follows:

The plaintiff in the case was a lawyer; obtained permanent and actual residence at Chanute, Neosho County, Kansas; resided there for several years, and was then appointed Collector of Internal Revenue of the United States for the District of Kansas. The office of such collector was required to be at Leavenworth, Leavenworth County, Kansas, and

the duties of the office required the plaintiff's presence in Leavenworth nearly all the time. The plaintiff went to Leavenworth and remained there for about five years, but at no time did he have any intention of changing his place of residence, but at all times considered Chanute his actual place of residence, and continued to vote there and intended to return to Chanute whenever he should cease to hold his office. He was a single man and boarded at Leavenworth with a family for about three or four years. He then married a woman from Pittsburgh; after his marriage he and his wife boarded at Leavenworth for about seven or eight months, when the plaintiff rented a furnished house and kept house there for about seven weeks, when they separated and the wife went back to her former home in Pittsburgh and the plaintiff rented sleeping apartments and again commenced to board. He continued to board at Leavenworth for about two months, when he commenced the present action in Neosho County.

The court held that he was an actual resident of Neosho County.

The court further says that (p. 717):

> "The words 'resident' and 'actual resident' as used in the divorce statutes we think contemplate a residence and actual residence with substantially the same attributes as are intended when the word 'domicile' is used. And we do not think that it makes any difference that the word residence sometimes or in some other statute may mean something else. It may be that for the purpose of serving a summons, the words 'usual place of residence' should be held to mean the place where the defendant is in fact residing for the time being; though, *contra*, see Love *vs.* Cherry, 24 Iowa, 204. But we do not think that the words 'resident' or 'actual resident' as used in the divorce statutes can have in contemplation any such kind of residence. In the divorce statutes we think these words have in contemplation a residence of a more permanent and fixed character."

In the case of Love *vs.* Cherry the plaintiff acquired a residence in Iowa, but later went to Texas to transact some business which necessitated her becoming a resident of Texas in order to administer on the estate of a deceased relative, but the evidence offered appeared to show that it was her intention to return to Iowa after the business was settled up. During her absence a summons was left at her place of residence in Iowa, and the court held that she was a resident of Iowa in contemplation of the statute, which required the summons to be left at her usual place of residence.

In the case of Bradley *vs.* Fraser, 54 Iowa, 289, the same general subject was discussed under the following circumstances:

Section 3507 of the Iowa Code (1880) provides that—

> "The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; but does not embrace suits for the recovery of money against *actual residents* of any other county."

The defendant was a resident of Buchanan County, Iowa, and removed with his family to Clayton County for the purpose of building a school-house. He kept house while there (about six months) and boarded his employees. Suit was commenced in Clayton County and judgment rendered against him by a justice of the peace. The defendant claimed that the judgment was void because he was an *actual resident* of Buchanan County at the time the suit was commenced, and this question was certified to the Supreme Court for its decision. The court said:

> "On the first day of June, 1878, Bach was a resident of Buchanan County. Did he because of the existence of the facts found by the court, cease to be an actual resident of that county? He went to Clayton County, with his family, to build a school-house under contract, intending to return as soon as the jab was finished, and during the time he was in Clayton County, he held this intention and regarded

> Buchanan County as his residence and home, and his stay in McGregor as temporary. Under these circumstances, he continued, in the most enlarged sense of the term, a resident of Buchanan County. If he had returned there on election day, we entertain no doubt that he would have been entitled to vote. This he could do upon no other theory than that during his absence he had all the time continued a resident of the county. * * * We think that the term *'resides'* as used in the above statute, means a permanent and fixed, and not a mere transient or temporary abode, and that it does not essentially differ from the word 'domicile.' Bach, notwithstanding his temporary stay in Clayton County, continued to be an actual resident of Buchanan County."

In the case of Church *vs.* Grossman (49 Iowa, 444), suit was brought upon a judgment rendered in St. Lawrence County, New York. The New York law provides that no person shall be proceeded against by summons out of the county in which he resides. The defendant had shipped his goods and household effects to Michigan preparatory to removing to that State and at the time the summons was served he was visiting his father in Jefferson County, New York. He claimed that the New York judgment was void on the ground that he was a resident of Jefferson County at the time and the justice of the peace had no jurisdiction to render judgment against him. The court said:

> "Under these facts, where was his residence when the action was commenced? We think that the term *resides* (as used in the above statute) means a permanent and fixed and not a mere transient or temporary abode, and that it does not essentially differ from the word domicile. * * * It is very clear that the defendant's residence was in the county of St. Lawrence until the first day of February [the day before he was served with the summons], 1872. It must, too, we think, be conceded that his residence remained there until he acquired a residence elsewhere. He had not on the second day of February

> acquired a residence in Michigan for he had then merely formed the intention of removing to Michigan and had shipped a portion of his goods there. Mere intention cannot change a residence. What then was the character of his two weeks' stay with his father in Jefferson County? He went there merely for temporary purposes * * * with no intention of remaining but a short time until he could get ready to permanently leave the State. Did his remaining there, and for that purpose, impress upon him the character of a resident of Jefferson County? We think it did not. In order to constitute a residence there must exist the *animus manendi*."

In the case of Kennedy *vs.* Ryall (67 N. Y., 379), a party came from England and lived in New York city for about seven months with the intention of making it his home. His wife and child were coming to join him, but were detained in the quarantine station. Suit was brought against the captain of the vessel for the death of the child. The court said:

> "The intestate was under the control of his parents, traveling with his mother to join his father at the home of the latter and of the family, and in law was actually residing in the city of New York."

In the case of People *ex rel. vs.* Owers (29 Colo., 535) the respondent was elected judge of a district court and *quo warranto* proceedings were instituted by the Attorney General of the State to oust him on the ground, among other things, that he did not reside in his district, as required by the constitution of the State. The case was decided upon an agreed statement of facts among which were that the respondent remained out of the district as much as possible on account of his health; that his wife lived in Denver (outside of his district) where they boarded part of the time and the other times rented a furnished house and finally rented an unfurnished house which his wife furnished and they kept house therein; that he was secretary of a mining company

with offices in Denver, which offices he occupied while in Denver, and his name was printed on door of said office; that *his name which appeared in the Denver City Directory for two years was inserted therein without his knowledge or direction;* that his wife and family had been in Lake County (the office of his judicial district) but once and then for less than ten days, during which time she visited the home of a friend; that when the defendant was in Lake County he occupied a sleeping room in the court-house, which he furnished; that he paid no rent for such room; that he did not keep, lease, or maintain any house or dwelling place in his district except as above stated, and that when in said district he always boarded and took his meals at restaurants; that he paid no personal, per capita, or poll tax in said district; that he had not been personally present in the district more than 300 days in two years and nine months, 50 days of which were devoted to his candidacy for the office of judge; that from two-thirds to three-fourths of his time was spent outside the district; that he voted in said district and claimed the same as his home and domicile.

The court, among other things, said:

> "Doubtless one, if not the only object of the section [requiring residence in the District] was to compel the officer to maintain his residence where litigants might expeditiously and with as little expense as possible, have access to him for the transaction of official business. Bearing this in mind, it is quite clear that 'residence' here means an actual, as distinguished from a legal or constructive residence, or its equivalent, domicile; and it is equally certain that, thus far in defendant's second term, he has not complied with this mandatory provision by residing where it commands. This section, however, should be given a reasonable and not a purely technical or literal interpretation. For instance, no one would say that it was necessary for a district judge actually to reside and be physically present in his judicial district every hour, or day, or week, or month, or continuously every year during his term of office. If,

> however, he has removed his actual residence from his district and does not purpose to return, or intends to maintain his actual residence outside his district indefinitely, or for any considerable portion of his term, the section would be ignored, the office become vacant and the incumbent might be ousted because of such misconduct."

The writ was dismissed.

In this District the residence which continues, although the party concerned has been absent for a considerable time, residence having once been obtained, was construed manifestly as "actual" in the case of Bradstreet *vs.* Bradstreet, 18 D. C., 229, where the court said:

> "Unless, therefore, the law requires something more than actual and *bona fide* residence in this District, 'the requirement that the party applying has resided within,' etc., is fully satisfied by the proof in this case."

In the case of Kempster *vs.* Milwaukee, 97 Wis., 343, 347, the charter of the city of Milwaukee provided for residence "continuously for one year prior to his appointment" by the Commissioner of Health. We cite this case because assuredly the word "continuously" is stronger with reference to the facts in this case than the word "actual." But the court said:

> "The word 'residence' as used in the charter does not mean physical location continuously. It is used in the broad sense of domicile requisite to citizenship. For the purposes of such residence, there must be an actual location in the place in question with the intention of making it a permanent home. That is sufficient to meet all the requisites of legal residence at the outset. In one sense, a person may have more than one place of residence, but he can have only one which has the element of permanency, essential in a legal sense to his domicile. He can have only one

domicile at one time. To constitute that there must be an actual location with the intent to make such place his home indefinitely."

In this case the plaintiff admitted that during part of the time he was necessarily away on public business, under employment in the service of the United States.

The Essentials Necessary to Change Residence.

While this particular subject has been treated largely in the cases already discussed, there are certain very important ones necessary to be considered, as further elucidating the question, and from which we get additional confirmation of our position that the defendant, having acquired a domicile in the District of Columbia, to effect a change there must be, first, residence in the new locality, and, second, intention to remain there.

In the case of Chambers *vs.* Prince, 75 Fed., 176, the court held that the question of change of domicile is mostly one of intention with the party, as to which his declarations must control unless overthrown by acts inconsistent with them. Thus it was held that the effect of the repeated declarations of the plaintiff that it was not his intention to make his home in West Virginia, but that it was his intention to return to Missouri (where he had resided for many years) as soon as he had finished his business in West Virginia, was not overcome by evidence that he had resided in West Virginia for more than a year; that he had married in West Virginia, and that his wife declared she would not live in Missouri; that he had returned certain property for taxation in West Virginia, and that he had registered in hotels as from West Virginia.

It was held in the case of Marks *vs.* Marks (75 Fed., 321) that when a citizen of a State leaves that State and goes to another State, with the deliberate and final intention of making the latter State his home, it is not necessary in

order to acquire a domicile and citizenship therein that he should adopt a fixed local residence within such State; but immediately upon arriving therein he becomes a citizen of such State and a resident of any district or part of it in which he may for the time being abide. The court held that the party was a resident of Texas, notwithstanding she had no fixed resident or permanent home therein and *had registered in various hotels in said State as from Tennessee.* The court said:

> "It is not believed that any case can be found holding that a 'house of residence' or a fixed residence within the State is essential to establish a domicile." (See also cases cited.)

To effect a change of domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. (Hayes *vs.* Hayes, 74 Ill., 312.)

> "A domicile once acquired is presumed to continue until it is shown to have been changed. * * * Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation.
>
> "To constitute the new domicile two things are indispensable;—first, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. (Mitchell *vs.* U. S., 21 Wall., 350; 22 L. Ed., 584).

The constitution of Illinois provides that no person shall be eligible to the office of judge unless he shall have re-

sided in that State five years next preceding his election. (Article 6, section 17, constitution of 1870.) In the case of the People *ex rel. vs.* Connell (28 Ill. App., 285) the respondent had been elected judge, and proceedings in *quo warranto* were instituted against him on the ground that he was not qualified under the provisions of the constitution above referred to. It appears that Connell had been a resident of Illinois for a number of years, but he sold his property, closed up his business, and moved to Colorado, where he was admitted to the bar and practiced law, and to all appearances was a permanent citizen and resident of Colorado. Thereafter he returned to Illinois, and less than three years after his return was elected judge. The court said:

> "Great stress is laid by the relator upon the fact that the respondent sold all his property in this State, and upon reaching Colorado bought him a library suitable for the demands of the practice in that State, and that he did go into business there and engaged in the practice of his profession. Respondent says he was compelled to do these things to provide means to support himself and wife while living there.
> * * *
> "After a careful consideration of all the evidence, we are satisfied that the relator entirely failed to establish the charge of ineligibility and that the respondent furnished satisfactory proof that he never did form a settled purpose to abandon the State, but that it was all the time his intention to return to Illinois upon the restoration of his wife's health.
> * * *
> "Under the last above rule laid down we think the proofs fail to show that the relator ever gained a permanent residence in Colorado or that he lost his residence in Illinois."

A similar case is that of Smith *vs.* People *ex rel.* Frisbie (44 Ill., 16).

The court said:

> "Before he left this State, and for a short period after his arrival in Tennessee, he frequently declared that it was only an experiment. That if he found that the feelings of the people there were such that he could remain with satisfaction, he would not return; but if he found that he could not, then he would return to Illinois. * * * So far as the evidence discloses, he at no time expressed an unqualified intention to remain in Tennessee. * * * He was in Tennessee in the practice, some six months, having his family with him, perhaps, as much as two months immediately after his arrival there, undetermined whether he would remain, and the remainder of the time fully determined to return to this State.
>
> "In this case we think the evidence, at most, leaves the question whether he had lost his residence in this State one of doubt. It does not appear that he ever intended to abandon his residence here; but, on the contrary, during all but a short period of time he expressed a determination to return, and for that short period he only seemed to have been in a state of doubt. We think, that, when the residence is lost, it is by a union of intention and acts; but the intention in many cases will be inferred from the surrounding circumstances. In this case, however, we do not think all of the circumstances appearing in evidence establish a presumption of loss of residence sufficient to overcome the presumption arising from the fact that the Governor gave him the commission under which he is now acting."

Name in Directory and Address in Hotel Registers.

The eleventh rejected prayer of the respondent declares that the hotel registers have no evidential weight in this case as to respondent's domicile, nor does the appearance of respondent's name in a Chicago directory, if the jury

find the same so appeared, without his prior knowledge. But to the contrary, the court instructed the jury as follows:

> "You should take into consideration all the evidence upon his intention to return—namely, what he did in Chicago, the manner in which he lived there, his activities, his name appearing in the city directory, which, while he said he was not responsible for it, is an evidentiary fact of some importance, though not great, to my mind. I also give little weight—and I think you should give little weight—to the mere question of registration in the hotel registers from different cities. It is a fact to be considered, but I think entitled to very little weight in determining his intention to return."

From the foregoing, it will appear that while the judge gave little weight to the mere question of registration, he nevertheless submitted its effect to the jury as a fact to be considered. He also submitted to the jury as an "evidentiary fact of some importance" the appearance of respondent's name in the directory, although he said he was not responsible for it, and although there was no evidence in the record tending to show any responsibility.

In the case of People *ex rel. vs.* Owers, 29 Col., 535, the court treated the appearance of a name in a directory without the knowledge or direction of the respondent as in nowise important.

In Marks *vs.* Marks, 75 Federal, 321, the court rejected as unimportant the fact that a party had registered in hotels from a certain place.

In Chambers *vs.* Prince, 75 Federal, 176, 179, the court said, "It cannot be doubted that a man has the right to register either from his domicile or from his temporary place of abode," again rejecting hotel registration under the circumstances as unimportant.

The jury, therefore, undoubtedly were misled by the direction of the court treating the circumstances as facts to be considered or even evidentiary facts "of some importance."

We respectfully submit that the judgment of the trial court, affirmed by the Court of Appeals, must be set aside, with directions to dismiss the proceedings with costs.

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APPENDIX A.

Quo Warranto.

SEC. 1538. AGAINST WHOM ISSUED.—A *quo warranto* may be issued from the Supreme Court of the District in the name of the United States—

First. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.

Second. Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District.

And said proceedings shall be deemed a civil action.

SEC. 1539. WHO MAY INSTITUTE.—The Attorney General or the District Attorney may institute such proceeding on his own motion, or on the relation of a third person. But such writ shall not be issued on the relation of a third person, except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of the application, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

SEC. 1540. IF ATTORNEY GENERAL AND DISTRICT ATTORNEY REFUSE.—If the Attorney General and District Attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued, and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

SEC. 1541. RELATOR CLAIMING OFFICE.—When such proceeding is against a person for usurping an office, on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office.

CHAPTER XVIII.

Corporations.

SEC. 586. QUO WARRANTO.—In case any such corporation shall at any time violate or fail to comply with any of the preceding provisions, upon complaint being made to the Supreme Court of the District, a writ of *quo warranto* shall issue, and the District Attorney of the United States shall prosecute, in behalf of the people, for a forfeiture of all rights and privileges secured by this subchapter, to such corporation.

APPENDIX "B."

Statute of Anne, Sections 4 and 5 (9 Anne, Ch. 20, 1710).

An Act for Rendering the Proceedings upon Writs of Mandamus and Informations in the Nature of a *Quo Warranto* More Speedy and Effectual; and for the More Easy Trying and Determining the Rights of Offices and Franchises in Corporations and Boroughs.

"IV. *And be it further enacted by the authority aforesaid,* That from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the respective courts, with the leave of the said courts respectively, to exhibit one or more information or informations in the nature of a *quo warranto,* at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto;* and if it shall appear to the said respective courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises, and such person or persons against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where such information shall be filed shall give further time to such person or persons against whom such information shall be exhibited to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto* shall proceed thereupon with the most

convenient speed that may be; any law or usage to the contrary thereof in any wise notwithstanding.

"V. And be it further enacted and declared by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall in any of the said cases be exhibited in any of the said courts, shall be found or adjudged guilty of an usurpation, or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts respectively as well to give judgment of ouster against such person or persons, of and from any of the said offices or franchises, as to fine such person or persons respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts respectively to give judgment that the relator or relators, in such information named, shall recover his or their costs of such prosecution; and if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given shall recover his or their costs therein expended against such relator or relators; such costs to be levied in manner aforesaid."

APPENDIX C.

The following States, either by express statute or decisions or both, forbid as against public policy proceedings in *quo warranto* to try title to public office at the suit of a private individual not claiming title to the office nor otherwise specially interested.

ARKANSAS:

(1) *Statutes:* Kirby's Digest Ark. Statutes (1904).

SEC. 7881. In lieu of the writs of *scire facias* and *quo warranto*, or of an information in the nature of *quo warranto*, actions by proceedings at law may be brought to * * * prevent the usurpation of an office or franchise.

SEC. 7983. Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise.

SEC. 7984. It shall be the duty of the several prosecuting attorneys to institute the actions mentioned in this chapter against all persons who have or shall usurp county offices or franchises, where there is no other person entitled thereto, or the person entitled fails to institute the same for three months after the usurpation.

SEC. 7985. For usurpation of other than county offices or franchises, the action by the State shall be instituted and prosecuted by the attorney-general.

(2) *Decisions:*

Ramsay vs. Carhart, 27 Ark., 12, 13, and *Wheat vs. Smith*, 50 Ark., 266, hold that no private party may bring *quo warranto* except one entitled to the office.

CALIFORNIA:

(1) *Statutes:* Kerr's Code of Civil Procedure (1907).

SEC. 803. An action may be brought by the Attorney-General, in the name of the people of this State, upon his

own information, or upon the complaint of a private party, against any person who usurps, intrudes, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or executed by any person, or when he is directed to do so by the Governor.

(2) *Decisions:*

Lamb vs. Webb, 151 Cal., 451:

A rival candidate asked mandamus against the Attorney general to compel him to bring *quo warranto* against the incumbent of a contested office. The court refused the petition, saying (p. 454):

> "Assuming for the purpose of this appeal that the Attorney General's discretion under the said section is not entirely beyond the control of a court, and that the other points discussed should be determined in favor of respondent, still it is clear that the power of a court to compel him to commence a suit, against his own conviction and conscientious belief that such leave should not be given, should be exercised only where the abuse of discretion by the Attorney General in refusing the leave is extreme and clearly indefensible. When such an extreme case does not appear, a decree of a court compelling him to act against his judgment is erroneous, and is itself an abuse of discretion."

DAKOTA (Territory):

(1) *Statutes:* Dakota Revised Code.

SEC. 534. * * * An action may be brought by any district attorney in the name of the Territory, upon his own information, *or upon the complaint of any private party,* against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this Territory, or any office in a corporation created by the authority of this Territory; or,

* * * * * * *

SEC. 535. When an action shall be brought by the district attorney by virtue of this chapter, *on the relation or information of a person having an interest in the question,* the name of such person shall be joined with the Territory as plaintiff. And in every such case the district attorney may require as a condition for bringing such action, that satisfactory security shall be given to indemnify the Territory against costs and expenses to be incurred thereby.

(2) *Decision:*

This statute was construed by the Supreme Court of the Territory in *Territory ex rel. Peterson vs. Hauxhurst,* 3 Dak., 205, 213, which involved the title to the office of register of deeds of the County of Brookings, an elective office. *Held* (p. 213) that when the action is not brought by the District Attorney in the name of the Territory, upon his own information, but by a relator claiming to be one of the parties plaintiff *and to have an interest in the question,* it must appear from the facts alleged in the complaint that *the relator is entitled to the office in controversy.*

FLORIDA:

(1) *Statutes:* General Statutes of Florida (1906).

2259. (1782.) *Right of claimant upon refusal of Attorney General.*—Any person claiming title to an office which is exercised by another shall have the right, upon refusal by the Attorney General to institute proceedings in the name of the State upon such claimant's relation, or upon the Attorney General's refusal to file a complaint setting forth his name as the person rightfully entitled to the office, to file an information or institute an action in the name of the State against the person exercising the office, setting up his own claim. In this case the court is authorized and required to determine the right of the claimant to the office, if he so desires. However, in this, as well as in all other proceedings of this character, no person shall be adjudged entitled to hold an office except upon full proof of his title to the office.

(2) *Decisions:*

Apparently, suit can only be brought by the Attorney General or by a rival claimant for the contested office.

In *Robinson vs. Jones,* 14 Fla., 256, it was held that an individual citizen may not institute *quo warranto* against a *de facto* municipal corporation, the institution of such actions being in the discretion of the Attorney General.

See also *State vs. Bryan,* 50 Fla., 293, 350, 351, where the court said:

> "The Attorney General being intimately associated with the other departments of the Government, being as well the proper legal adviser of the executive as the legislative department of the Government, it is highly proper, whenever the right to a public office is to be tried, that he should be clothed with a discretion in the premises which should be exercised at least independently of the courts in actions of this character.
>
> * * * * * * *
>
> "This discretion is vested in the Attorney General; if he exercises it improperly, there is another tribunal, the people, or their grand inquest, the Assembly, to punish him."
>
> See also *State vs. Gleason,* 12 Fla., 190.

IDAHO:

(1) *Statutes:* Idaho Revised Codes.

SEC. 4612. An action may be brought in the name of the people of the State against any person who usurps, intrudes into, holds or exercises any office or franchise, real or pretended, within this State, without authority of law. Such action shall be brought by the prosecuting attorney of the proper county, when the office or franchise relates to a county, precinct, or city, and when such office or franchise relates to the State, by the Attorney General; and it shall be the duty of the proper officer, upon proper showing, to bring such action whenever he has reason to believe that any such office or franchise has been usurped, intruded into, held or exercised without authority of law. Any person rightfully entitled to an office or franchise may bring an action in his own name against the person who has usurped, intruded into, or who holds or exercises the same.

(2) *Decisions:*

Toncray vs. Budge, 14 Idaho, 621, saying, 639:

"The action must be prosecuted in the name of the people, and on relation of the Attorney General or County Attorney, as the case may be. These statutes authorizing proceedings against usurpers and intruders into office are in the interest of and for the protection of the people at large, and no person, except one who is himself entitled to the office, is supposed to have any more interest in such a proceeding than any other citizen. The remedy is therefore only available to the people, except in the one single instance under sec. 4612, where a person originally entitled to the office may bring an action in his own name against a usurper."

ILLINOIS:

(1) *Statutes:* Hurd's Revised Statutes (1911), p. 1794.

1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this State, * * * the Attorney General or State's Attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a *quo warranto* in the name of the People of the State of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue. When it appears to the court or judge that the several rights of divers parties to the same office or franchise, privilege, exemption or license, may properly be determined on one (1) information, the court or judge may give leave to join all of such persons in the same information, in order to try their respective rights to such office, franchise, privilege, exemption or license.

(2) *Decisions:*

Porter vs. The People, 182 Ill., 516; *The People vs. North Chicago Ry. Co.,* 88 Ill., 537; and *The People vs. The Lake Street Elevated Co.,* 54 Ill. App., 348, hold that suits must be begun in every case by the Attorney General or the State's Attorney, in his official capacity, acting from a sense of duty, not merely lending his name to a private party.

INDIANA:

(1) *Statutes:* Thornton's Annotated Civil Code, sec. 946.

The information may be filed by the Prosecuting Attorney in the Circuit Court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information (R. S., 1881, sec. 1132; 1 Burns, 1901, sec. 1146).

(2) *Decisions:*

Antrim vs. Reardon, 161 Ind., 249:

Held that "any other person" in the above statute means "person having a special interest not common to the general public." Mere status of citizen and taxpayer not sufficient. See also *Modlin vs. State,* 175 Ind., 511; *State vs. Johnston,* 173 Ind., 14; *State ex rel. Davis vs. Smith,* 32 Ind., 213.

KANSAS:

(1) *Statutes:* General Statutes of Kansas (1909), sec. 6277.

When the action is brought by the Attorney General or the County Attorney of any county of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the State, but where the action is brought by a person claiming an interest in the office, franchise or corporation, or claiming any interest adverse to the franchise, gift or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction, and at the expense of such person; whenever the action is brought

against a person for usurping an office by the Attorney General or the County Attorney, he shall set forth in the petition the name of the person rightfully entitled to the office, and his right or title thereto; when the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained.

(2) *Decisions:*

Hudson vs. Conklin, 77 Kansas, 764, the court saying:

"Since it is conceded that Hudson [the minority candidate] has no title to the office, he has *no interest,* personal or peculiar to himself, which warrants him in challenging the right of the incumbent to hold the office."

See also:

Miller et al. vs. Palermo, 12 Kansas, 14 (opinion by Brewer, J.).

Craft vs. Jackson Co., 5 Kansas, 518.

KENTUCKY:

(1) *Statutes:* Carroll, Kentucky Codes (1913), p. 300.

SEC. 483. If a person usurp an office or franchise, the person entitled thereto, or the Commonwealth, may prevent the usurpation by an ordinary action.

SEC. 484. It shall be the duty of the several Commonwealth attorneys to institute the actions mentioned in this chapter against usurpers of county offices or franchises, if no other person be entitled thereto, or if the person entitled fail to institute the same during three months after usurpation.

SEC. 485. For usurpation of other than county offices or franchises, the action by the Commonwealth shall be by the Attorney General.

(2) *Decisions:*

King vs. Kahne et al., 87 S. W. (Ky.), 807; *Wilson vs. Tye,* 102 S. W. (Ky.), 856; and *Scholl vs. Bell,* 102 S. W. (Ky.), 248, 255, hold that the above statute supersedes the common law and the remedies there prescribed are exclusive, namely, action (1) by the person entitled to the office, or (2) by the Attorney General or Commonwealth Attorney.

MAINE:

(1) *Statutes:* Maine Revised Statutes (1903), p. 116.

SEC. 70. Any person claiming to be elected to any county or municipal office, or to the office of County Attorney, may proceed as in equity against the person holding or claiming to hold such office, or holding a certificate of election to such office, or who has been declared elected thereto by any returning board or officer, or who has been notified of such election, by petition returnable before any justice of the supreme judicial court, in term time or vacation, in the county where either party resides, or where the duties of such office are to be performed, and said court shall have jurisdiction thereof.

Laws of Maine (1911), p. 49, sec. 2:

When in *quo warranto* proceedings the title to office, *in a private corporation*, is involved, the petition or information may be brought in the name of the interested party and the Attorney General need not be a party thereto. (Italics ours.)

(2) *Decisions:*

No decisions directly in point, but held that common law as to *quo warranto* is in effect in Maine.

Ex parte Davis, 41 Maine, 57.

Littlefield, Attorney General, vs. Newell, 85 Maine, 273.

MASSACHUSETTS:

(1) *Statutes:* No statute.

(2) *Decisions:*

Goddard vs. Smithett, 3 Gray, 117, 122-123.

There is, and always has been, in this Commonwealth, an authority in the Attorney and Solicitor General, as incident to the office, to file informations *ex officio* in the name and behalf of the Commonwealth. The information is in its nature a prosecution for some offense against the Government, by an application to a court of criminal jurisdiction, and is essentially a public criminal prosecution. When filed by the Attorney General, it is done at his own discretion.

according to his own view of the rights of the Government without leave of court, nor will the court direct or advise him on the subject.

Commonwealth vs. Fowler, 10 Mass., 290.
Haupt vs. Rogers, 170 Mass., 71.

MICHIGAN:

(1) *Statutes:* How., Mich. Stat., 2d ed., sec. 14082.

Informations under this act may be filed by the prosecuting attorney of the proper county, on his own relation, or that of any citizen of the county without leave of the court, or by any citizen of the county by special leave of the court, or a judge thereof.

(2) *Decisions:*

Vrooman vs. Michie, 69 Mich., 42, 47, saying:

"In the absence of any public prosecutor it has always been customary in England to allow prosecutions to be conducted by private complainant, and in some cases a relator is permitted to complain who is not himself entitled to the office if he has any tangible interest in the matter. This is never allowed in this State in the case of public officers."

Lamoreaux vs. Attorney General, 89 Mich., 146, 152, while indicating that cases might arise where a citizen, a taxpayer, could bring suit by special leave of court, declares that in order to avoid vexatious prosecutions "a very precise and positive showing" will be exacted of the relator.

MINNESOTA:

(1) *Statutes:* Minnesota General Statutes (1913), sec. 8255.

Whenever the Attorney General has reason to believe that a cause of action can be proved, he may bring an action in the name of the State upon his own information or upon the complaint of a private person, against the person offending, * * *.

(2) *Decisions:*

The early cases distinctly held that without the consent of the Attorney General a mere citizen and taxpayer would not be permitted to file *quo warranto* against a public officer.

Barnum vs. Gilman, 27 Minn., 466; *State vs. Tracy*, 48 Minn., 497. In *State vs. Dahl*, 69 Minn., 108, 113, however, there is a dictum, contrary to *Barnum vs. Gilman, supra*, that if the Attorney General refuses to bring *quo warranto* in a clear case the court in its discretion may permit a mere taxpayer to do so. In *State vs. Olson*, 107 Minn., 136, however, the *Dahl case* was "restricted" and seemingly overruled.

MISSISSIPPI:

(1) *Statutes:* Mississippi Code (1906), sec. 4018.

The proceedings in such cases (*quo warranto*) shall be by information, in the name of the State, by the Attorney General or a District Attorney, on his own motion or on relation of another, and in a case to try the right of an office, on the relation of the claimant.

(2) *Decisions:*

Harrison vs. Greaves, 59 Miss., 453, and *Andrews vs. State ex rel. Covington*, 69 Miss., 740, are clear that no private citizen can bring *quo warranto* except a claimant to the office.

MISSOURI:

(1) *Statutes:* Revised Statutes of Missouri (1909).

SEC. 2631. In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney General of the State, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a *quo warranto*, at the relation of any person desiring to prosecute the same.

(2) *Decisions:*

State vs. Boal, 46 Mo., 528.

A resident, voter, and minority candidate has not sufficient interest to entitle him to maintain an action in *quo warranto*.

Accord:

State vs. Lawrence, 38 Mo., 535.
State vs. Stewart, 32 Mo., 379.
State vs. Talty, 166 Mo., 529.
State vs. Taylor, 208 Mo., 442.

MONTANA:

(1) *Statutes:* Revised Code, Mont. (1907):

6947. *When private person may commence action.*—A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or by an attorney and counselor at law, may bring an action therefor in the name of the State, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking with two sufficient sureties, to be approved by the judge or any judge of the court in which the action is brought, conditioned that such person will pay any judgment for costs or damages recovered against him, and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

6948. *What complaint to contain.*—When the action is against a person for usurping an office, the complaint shall set forth the name of the person who claims to be entitled thereto * * *.

Note that a distinction is made between elective and appointive offices, for in the case of elective offices any elector may contest the right of the person declared to be elected (sec. 7234).

(2) *Decisions:*

No decisions.

NEBRASKA:

(1) *Statutes:* Cobbey's Annotated Statutes of Nebraska:

1708. Such information [*quo warranto*] may be filed by the prosecuting attorney of the proper county whenever he deems it his duty so to do.

(2) *Decisions:*

State vs. Moores, 52 Neb., 634, 636: A private party cannot bring *quo warranto* unless he first shows himself entitled to the office.
State vs. Stein, 13 Neb., 529.
Boyd vs. Thayer, 143 U. S., 135, 157.

State vs. Grier, 86 Neb., 88: If prosecuting attorney gives consent, suit will lie by private person, citizen or taxpayer.

NEVADA:

(1) *Statutes:* Revised Laws, 1912:

5656. A civil action may be brought in the name of the State:

1. Against a person who usurps * * * a public office * * *.

5658. The Attorney General, when directed by the Governor, shall commence any such action; and when, upon complaint or otherwise, he has good reason to believe that any case specified in the preceding section can be established by proof, he shall commence an action.

5660. A person claiming to be entitled to a public office unlawfully held and exercised by another may, by himself or by an attorney and counselor at law, bring an action therefor in the name of the State, as provided in this chapter.

(2) *Decisions:*

No decisions under above statute; under earlier statute it was held that where the Attorney General refused to sue, a *rival claimant* to the office might bring action himself. *State vs. Sadler,* 25 Nev., 131.

NEW HAMPSHIRE:

(1) *Statutes:* No statutes—common law.

(2) *Decisions:*

Osgood vs. Jones, 60 N. H., 543. Private citizen may not bring bill in equity to enjoin public officer from exercise of office. Proper remedy is *quo warranto* by Attorney General.

NEW YORK:

(1) *Statutes:* Bliss' N. Y. Annot. Code, 1913 (p. 3471):

1948. * * * The Attorney General may maintain an action upon his own information or upon the complaint of a private person * * *.

(2) *Decisions:*

Demarest vs. Wickham, 63 N. Y., 320:

Individual may not sue in his own name as corporator or taxpayer.

Concord Society vs. Stanton, 38 Hun. 1, 4:

Only Attorney General can sue.

People vs. Fairchild, 8 Hun., 334; 67 N. Y., 334:

Attorney General's decision absolute. Mandamus does not lie to compel him to sue.

Accord:

People vs. Attorney General, 22 Barb., 114.

NORTH CAROLINA:

(1) *Statutes:* Code of Civil Procedure (Pell's Revisal):

827. An action may be brought by the Attorney General, in the name of the State, upon his own information, or upon the complaint of any private party, against the parties offending, in the following cases [including unlawful exercise of public office]: * * *

828. When application shall be made to the Attorney General by a private relator to bring such an action, he shall grant the leave that the same may be brought in the name of the State, upon the relation of such applicant, upon such applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the bringing of such action.

(2) *Decisions:*

Midgett vs. Gray, 158 N. C., 133, 135; 159 N. C., 443:

Held: Where leave of Attorney General has not been obtained an action by an individual will be dismissed. Accord, *Saunders vs. Gattling,* 81 N. C., 298, 301.

The granting of such leave rests in the discretion of the Attorney General..

Ford vs. Hall, 111 N. C., 369.

NORTH DAKOTA:

(1) *Statutes:* Compiled Laws of Dakota, 1887:

5348. An action may be brought by any district attorney in the name of the Territory, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp * * * any public office * * *.

North Dakota Revised Codes, 1905:

7351. An action may be commenced by the State, or any person who has a *special* interest in the action, against the parties offending in the following cases [including usurpation of office].

(2) *Decisions:*

Wishek vs. Becker, 10 N. D., 63.

OHIO:

(1) *Statutes:* General Code of Ohio, 1910:

12303. A civil action may be brought in the name of the State:

1. Against a person who usurps * * * a public office * * *.

12305. When directed by the Governor, Supreme Court, or General Assembly, the Attorney General, or a prosecuting attorney shall commence such action. When, upon complaint, or otherwise, either of such officers has good reason to

believe that any case specified in the next preceding section can be established by proof, he shall commence such an action.

12306. Upon his own relation, such officer may bring such an action, or, upon leave of the court, or a judge thereof, in vacation, he may bring the action upon the relation of another person. * * *

SEC. 12307. A person claiming to be entitled to a public office unlawfully held and exercised by another, by himself or an attorney at law, upon giving security for costs, may bring an action therefor.

(2) *Decisions:*

In *State vs. Taylor,* 50 Oh. St., 120, the court said:

> "We are unable to find, in the statute, any authority for bringing *quo warranto* by or on the relation of a private individual except in the cases provided in the section above mentioned. * * *
>
> "Treating the motion as an application to the court to direct the Attorney General to commence the action desired, the established rule is that the court will exercise its power in that behalf, only 'when something relating to the court or its business renders it necessary and advisable.'"

Accord:

Thompson vs. Watson, 48 Oh. St., 552.
Re Bank of Mt. Pleasant, 5 Oh. St., 249.
State vs. Moffit, 5 Oh. St., 358.
State vs. Johnson, 8 C. C., n. s. (Oh.), 535.

OKLAHOMA:

(1) *Statutes:* Compiled Laws, 1909 (Art. XXVIII):

SEC. 6188. The writ of *quo warranto,* and proceedings by information in the nature of *quo warranto,* are abolished, and the remedies heretofore obtainable in those forms may be had by civil action.

SEC. 6189. Such action may be brought in the Supreme Court or in the district court, in the following cases: 1st, when any person shall usurp, intrude into, or unlawfully hold or exercise, any public office, or shall claim any fran-

chise within this State, or any office in any corporation created by authority of this State; 2nd, whenever any public officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office; * * *

SEC. 6190. When the action is brought by the Attorney General or the county attorney of any county of his own motion, or when directed to do so by competent authority, it shall be prosecuted in the name of the State, but where the action is brought by *a person claiming an interest in the office,* franchise or corporation, or claiming any interest adverse to the franchise, gift, or grant, which is the subject of the action, it shall be prosecuted in the name and under the direction, and at the expense of such persons; whenever the action is brought against a person for usurping an office by the Attorney General or the county attorney, he shall set forth in the petition the name of the person rightfully (entitled) to the office and his right or title thereto; when the action in such case is brought by the person claiming title, he may claim and recover any damage he may have sustained.

(2) *Decisions:*

No case reported of an attempt to bring *quo warranto* by any private person not a claimant to the office. But held in *Territory ex rel. vs. De Wolf,* 13 Okla., 454, that a private individual cannot proceed as relator against a corporate franchise by injunction or otherwise when showing no injury not shared by the general public.

OREGON:

(1) *Statutes:* Bellinger and Cotton's Annotated Codes & Statutes, pp. 232, 233*a:*

SEC. 367. An action at law may be maintained in the name of the State, upon the information of the prosecuting attorney, or upon the relation of a private party against the person offending, in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold, or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation either public or private, created or formed by or under the authority of this State; or,

2. When any public officer, civil or military, has done or suffered an act which, by the provisions of law, makes a forfeiture of his office, or,

* * * * * * *

(H. C., sec. 357.)

(2) *Decisions:*

State vs. Douglas Co. Road Co., 10 Ore., 198, 202. Relator cannot control the suit and his name on the information is mere surplusage.

Richard Everding vs. McGinn, District Attorney, 23 Ore., 15: Prosecuting attorney has absolute discretion and his decision will not be reviewed.

State ex rel. vs. Cook, 39 Ore., 377: Suit can be commenced only by the prosecuting attorney. Even where relator is rival claimant.

PENNSYLVANIA:

(1) *Statutes:* Purdon's Dig., vol. 3, pp. 3734, 3338-9:

And in any such case, the writ aforesaid [*quo warranto*] may be issued, upon the suggestion of the Attorney General, or his deputy, in the respective county, or of any person or persons, desiring to prosecute same.

(2) *Decisions:*

Commonwealth ex rel. McLaughlin vs. Cluley, 56 Pa. St., 270:

Held: That even under the very liberal words of this statute "any person * * * desiring to prosecute the same," the "person" must show some special interest, and merely being a citizen or a taxpayer, or even the defeated candidate is not enough.

Commonwealth ex rel. Butterfield vs. McCarter, 98 Pa. St., 607.

Commonwealth vs. Stevens, 6 Luz. L. R. (Pa.), 37; P. & L. Dig. Dec., vol. 17, p. 29008.

Commonwealth ex rel. Trimble vs. Jenkins, 6 Kulp (Pa.), 17.

Commonwealth ex rel. Heacock et al. vs. Horne, 10 Phila., 164.

Commonwealth ex rel. Lewellen vs. Wisler & Grim, 15 Phila., 322.

RHODE ISLAND:

(1) *Statutes:* General Laws, 1896, ch. 263:

SEC. 1. The title to any office, to determine which the writ of *quo warranto* lies at the common law, may be brought in question by petition in equity in the Supreme Court.

SEC. 2. In any proceeding in *quo warranto* or by information or by petition in equity in the nature of *quo warranto*, the court may determine the title of the relator or petitioner as well as that of the respondent; &c.

(2) *Decisions:*

Ney et al. vs. Whitely et al., 26 R. I., 464 (1904), holding that only the Attorney General or the person entitled to the office may sue.

TENNESSEE:

(1) *Statutes:* Tenn. Code, 1884:

SEC. 4149. The suit is brought by the Attorney General for the district or county, when directed so to do by the General Assembly, or by the Governor and Attorney General of the State concurring.

SEC. 4150. It is also brought on the information of any person, upon such person giving security for the costs of the proceedings, to be approved by the clerk of the court in which the bill is filed.

(2) *Decisions:*

State vs. Campbell, 76 Tenn., 74, 75, holding that section 4150, *supra*, though apparently permitting "*any* person" to sue, is to be construed together with section 4149, and that the Attorney General is always a necessary party and no suit can be begun without his consent; *State ex Rel. McConnell*, 71 Tenn., 332.

TEXAS:

(1) *Statutes:* Revised Civil Statutes, 1911, title "Quo Warranto":

Article 6398. In case any person shall usurp, intrude into or unlawfully hold * * * any office * * *

the attorney general, or district or county attorney of the proper county or district, either of his own accord, or at the instance of any individual relator, may present a petition to the district court of the proper county, or any judge thereof in vacation, for leave to file an information in the nature of a *quo warranto* in the name of the State of Texas; and, if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed and process to issue (Acts of 1879, S. S., p. 43).

(2) *Decisions:*

Deavor vs. State, 27 Tex. Civ. App., 453: A mere private citizen cannot even be a relator; *a fortiori* he cannot sue in his own name; *Brumby vs. Boyd et al.,* 28 Tex. Civ. App., 164.

UTAH:

(1) *Statutes:* Utah Compiled Laws, 1907:

3609. A civil action may be brought in the name of the State:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise, within this State, or an office in a corporation created by the authority of this State. * * *

* * * * * * *

3611. The Attorney General, when directed by the Governor, shall commence any such action; * * *.

3612. Such officer may, upon his own relation, bring any such action, or he may on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of section thirty-six hundred and nine, he may require security for costs to be given as in other causes.

3613. A person claiming to be entitled to a public office unlawfully held and exercised by another, may, by himself or by an attorney and counsellor at law, bring an action therefor in the name of the State, as provided in this chapter. * * *

(2) *Decisions:*

State vs. Ryan, 41 Utah, 327-333, holding that a mere citizen and taxpayer may not bring *quo warranto* even though the Attorney General refuses to act. See, also, *People vs. Clayton,* 4 Utah, 421.

VERMONT:

(1) *Statutes:* Statutes 1894, ch. 82, title "Quo Warranto" (P. S., 1973):

SEC. 1618. The complaint may be preferred and prosecuted by the State's attorney or the proper county, by virtue of his office, either upon his motion, or upon the relation of a private person; or it may be preferred and prosecuted by a *person interested* in the matter of the complaint and the judgment sought; in which last case the complaint shall be verified by oath and security for costs taken to the defendant, by way of recognizance.

(2) *Decisions:*

Brown vs. Alderman, 82 Vermont, 529, holding that neither under the foregoing statute, nor otherwise, has a private citizen, having no different interest than the public at large, the right to prosecute an information in the nature of a *quo warranto.*

VIRGINIA:

(1) *Statutes:* Pollard's Code, 1904 (act of 1887; prior to which time the remedy was administered as at common law):

SEC. 3022. A writ of *quo warranto* may be awarded and prosecuted in the name of Virginia, in any of the following cases, to-wit:

* * * * * * *

Fourth. Against any person who shall intrude into or usurp any public office.

SEC. 3023. Whenever the Attorney General or attorney for the Commonwealth of any county or corporation, the circuit or corporation court whereof has jurisdiction of the proceeding, is satisfied that a cause for the writ exists, he may, at his own instance, or at the relation of *any person interested,* apply by petition to the said circuit or corpora-

tion court or to the judge thereof in vacation, to have such writ issued, and shall state the reasons therefor in the petition. If the Attorney General or attorney for the Commonwealth, upon being requested as aforesaid, refuse or fail to apply for the writ, the person so interested may present his petition to such court or judge asking for the same.

SEC. 3024. If, in the opinion of the court or judge, the reasons so stated in the petition are sufficient in law, the said writ shall be awarded by the court or judge, returnable to the next term of the court, and the same shall be signed by the judge and attested by the clerk of such court. But if the writ be awarded at the relation of any person, it shall not be issued until the relator shall have given bond with sufficient surety (if such bond be required by the court or judge), to be approved by the clerk, in such penalty as the court or judge shall prescribe with condition that the relator shall pay all such costs and expenses as may be incurred by the State in the prosecution of the writ, in case the same shall not be recovered from and paid by the defendant therein.

(2) *Decisions:*

In *Watkins vs. Venable,* 99 Va., 441, the following pertinent language occurs (443, 444):

"Neither at common law, under the modern practice, nor under the provisions of our statute in a case like this, is an applicant for the writ entitled, as a matter of absolute right, to have it issued, but whether it shall be awarded or not is subject, in a considerable degree, to the exercise of a wise judicial discretion. Smart on Mandamus and Quo Warranto, &c. (Am. ed., 1888), pp. 121-3; High's Extra. Leg. Rem., secs. 605, 628; Code, ch. 145, sec. 3024. In the exercise of this discretion, upon the application of a private relator, says Mr. High, 'It is proper for the court to take into consideration the necessity and policy of allowing the proceeding as well as the position and motives of the relator in proposing it, since this extraordinary remedy will not be allowed, merely to gratify a relator who has no interest in the subject of inquiry. The court will also weigh the consideration of public convenience involved, and will compare them with the injury complained of in determining whether to grant or refuse the application. And whenever it is apparent that the filing of the application would result in no

practical benefit, as where *there is no one claiming the office in opposition to the respondent*, and the time will expire before a trial of the right can be had, or where a new election for the office is about to occur, which will afford full redress to the relators, the court may properly refuse the application for leave to file the information.' See also Smart on Mand. and Quo War., pp. 147 to 157." (Italics ours.)

WASHINGTON:

(1) *Statutes:* Washington Code, 1881:

SEC. 702. An information may be filed against any person or corporation in the following cases:

1. When any person shall usurp, intrude upon, or unlawfully hold or exercise any public office or franchise within the territory, or any office in any corporation created by the authority of the territory.

2. When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office.

3. When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise.

* * * * * * *

SEC. 703. The information may be filed by the prosecuting attorney in the district court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, *whenever he claim an interest in the office*, franchise or corporation which is the subject of the information.

* * * * * * *

SEC. 705. Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person he shall show his interest in the matter, and he may claim the damages he has sustained.

(2) *Decisions:*

Mills vs. State ex rel. Smith, 2 Wash., 566, 572: Holding that even the mayor of a city has no such interest as entitles him to bring *quo warranto* against a city councilman.

See also:

State ex rel. White vs. Point Roberts, &c., Co., 42 Wash., 409.

WEST VIRGINIA:

(1) *Statutes:* W. Va. Code, ch. 109, sec. 6.

A writ of *quo warranto* may be awarded and prosecuted in the name of the State of West Virginia, at the instance of the Attorney General, or prosecuting attorney of any county in any of the following cases, viz:

* * * * * * *

Fourth. Against any person who shall intrude into or usurp any public office. * * *

* * * * * * *

7. Whenever the Attorney General or prosecuting attorney of any county is satisfied that a cause exists therefor he may, at his own instance, or at the relation of any person interested, apply by petition to the circuit court of the county wherein the seat of government is, or of the county wherein the cause for the issuance of such writ arose, to have such writ issued, and shall state therein the reason therefor. Whenever such writ is issued at the relation of any person, the petition shall be to the circuit court of the county wherein the seat of government is, or of the county wherein the cause or any part thereof, for the issuing of the writ arose, as the relators may elect.

8. If, in the opinion of the court, the reasons so stated in the petition are sufficient in law, it shall award the said writ and the same shall be signed by the judge of such court and attested by the clerk thereof. * * *

9. In any case in which a writ of *quo warranto* would lie, the Attorney General or prosecuting attorney of any county, at his own instance, or at the relation of *any person interested* may, * * * apply to any such court as is mentioned in the seventh section of this chapter, for leave to file

an information in the nature of a writ of *quo warranto* for any of the causes * * * mentioned in the sixth section of this chapter. * * *

(2) *Decisions:*

State ex Rel. Depue vs. Matthews, 44 W. Va., 372, 384:

Held:

That a mere citizen and taxpayer cannot bring suit, the court saying, "If it had been intended that any person could apply, without qualification, why was it thought necessary to add the word *'interested'* in the statute?"

WISCONSIN:

(1) *Statutes.* Wisconsin Statutes, 1911:

SEC. 3466. An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall work a forfeiture of his office, or

* * * * * * *

SEC. 3455, Stats. 1898.

Such action may be brought in the name of the State by a private person on his own complaint when the Attorney General refuses to act or *when the office usurped pertains to a county, town, city, village, or school district.*

(1856, c. 120, s. 336; R. S. 1858, c. 160, s. 6; R. S. 1878, s. 3466.)

(2) *Decisions:*

State ex Rel. Heim vs. Williams, 144 Wis., 402:

Holding that where the Attorney General has refused to bring an action of *quo warranto* to try title to an office, a private person cannot maintain the action on his own com-

plaint under sec. 3466, Stats. 1898, unless he is entitled to the office, since, under sec. 3463, the proceeding is a civil action, and therefore, under sec. 2605, must be prosecuted in the name of the real party in interest.

Accord:

State vs. Anson, 132 Wis., 461.

It is held, however, that by reason of the specific provision of the statute "when the office usurped pertains to a county, town, city, village, or school district," a citizen and taxpayer by reason of his pecuniary interest in the common fund, may bring action.

State ex Rel. vs. Mott, 111 Wis., 19.
State ex Rel. vs. Leischer, 117 Wis., 475.
State ex Rel. vs. Lindemann, 132 Wis., 47.
State ex Rel. vs. Samuelson, 131 Wis., 490.
State ex Rel. vs. Smyth, 133 Wis., 588.

WYOMING:

(1) *Statutes:* Rev. Stats. Wyo., 1887:

SEC. 3092. A civil action may be brought in the name of the Territory;

First. Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this Territory, or an office in a corporation created by the authority of this Territory;

Second. Against a public officer, civil or military, who does or suffers an act which, by the provisions of law, works a forfeiture of his office;

* * * * * * *

SEC. 3094. The Attorney General or a prosecuting attorney, when directed by the governor, Supreme Court, or legislative assembly, shall commence any such action; * * *.

SEC. 3095. Such officer may, upon his own relation, bring any such action, or he may, on leave of the court, or a judge thereof in vacation, bring the action upon the relation of another person; and if the action be brought under the first subdivision of section three thousand and ninety-two, he may require security for costs, to be given as in other cases.

SEC. 3096. A person claiming to be entitled to a public office unlawfully held and exercised by another, may, by

himself or an attorney-at-law, upon giving security for costs, bring an action therefor.

(2) *Decisions:*

No cases directly in point; see, however, *Reals vs. Smith*, 8 Wyo., 159.

The following States incline to the opposite view:

ALABAMA:

(1) *Statutes:* Alabama Code, 1907.

5453. * * * An action may be brought in the name of the State against the party offending in the following cases:

(1) When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State * * *.

* * * * * * *

5454. * * * The judge of the circuit court may direct such action to be brought when he believes that any of the acts specified in the preceding section can be proved, and it is necessary for the public good, or it may be brought *without the direction of such judge on the information of any person giving security* for the costs of the action, to be approved by the clerk of the court in which the action is brought.

(2) *Decisions:*

In *State vs. Adams* (1829), 2 Stewart, 231-236, the court said:

This court does not believe that either law or policy requires that one man in the occupancy of an office shall be put out upon the complaint of a stranger. It is good policy that offices shall be filled, particularly so important an office as that of sheriff, not that they should be vacant. Therefore, if the relator has no right to the office, the inquiry is terminated.

But by reason of the extremely broad language of the statute above quoted, it seems to be now assumed (*sans* discussion) that the interest of the relator is immaterial.

Montgomery vs. State, 107 Ala., 372.
State vs. McGough, 118 Ala., 159.
Johnson vs. State, 132 Ala., 43.
Jackson vs. Tillman, 143 Ala., 145.

COLORADO:

(1) *Statutes:* Colorado Code, Anno., 1910.

320. WHEN ACTION BROUGHT BY DISTRICT ATTORNEY—WHEN BY PRIVATE PARTY.

SEC. 1. An action may be brought by the district attorney in the name of the people of this State, upon his own information, or upon the relation and complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within his district in the State, and it shall be the duty of the district attorney to bring the action whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held, or exercised by any person, or when he is directed to do so by the Governor; *and in case such district attorney shall neglect or refuse to bring such action upon the complaint of a private party, such action may be brought by such private party, upon his own relation, in the name of the people of the State.* (Mills Ann. Code, 1887, sec. 289.)

(2) *Decisions:*

Although the statute expressly authorizes an action upon the complaint of "a private party," there is much confusion as to whether the complainant will not be required to show some special interest other than that of citizen and taxpayer.

In *People ex rel. vs. Londoner,* 13 Col., 303, 314, it held that a "freeholder, resident and elector" might bring *quo warranto* against the mayor of Denver, where the district attorney refused to act. The plaintiff in this case, however, was the rival claimant. In *Darrow vs. People,* 8 Col., 417, 425, there is a dictum that a freeholder and taxpayer might bring *quo warranto* against a city alderman, though the action was in fact by the District Attorney. In *People ex rel. Jerome vs. Regents,* 24 Col., 175, a resident and taxpayer was permitted to bring *quo warranto* against the regents of the University of Colorado to test the validity of their incorporation, the court particularly relying, however, upon the fact that the Attorney General, being the legal adviser of the regents, would be required to represent both parties if *quo warranto* were brought by him (pp. 180-181).

In *People vs. Grand River Bridge Co.,* 13 Col., 11, however, the court in a very strong opinion refused to permit

the corporate franchise of a bridge company to be challenged even by a citizen whose land had been taken without compensation for the building of the bridge, saying:

It does not appear that he has any other or different interest in the result than such as he may have in common with all other citizens of the State (p. 12).

And in a recent case, *State R. R. Comm. vs. People*, 44 Col., 345, decided in 1908, the court refused to permit certain railroad corporations, organized and doing business within the State (and, of course, taxpayers), to bring *quo warranto* against the members of the State Railroad Commission, the District Attorney having refused.

People vs. Londoner and *People vs. Regents, supra*, were distinguished on the somewhat unconvincing ground that in those cases the avowed object was to safeguard public interests, not to protect merely private rights.

CONNECTICUT:

(1) *Statutes:* Connecticut General Statutes (1902), sec. 1026.

SEC. 2. When any person or corporation shall usurp the exercise of any office, franchise, or jurisdiction, the Superior Court may proceed, by information in the nature of *quo warranto*, to punish such person or corporation for such usurpation, according to the course of the common law; and may also permit such an information to be filed in the name of the State's Attorney in the county where the cause of action arises, at the relation of *any person desiring to prosecute the same*, against any person usurping any corporate franchise or office, and may proceed therein, and render judgment, according to the course of the common law.

(2) *Decisions:*

In *State ex rel. City of Waterbury vs. Martin*, 46 Conn., 479, 482, it was held that relator's interest as taxpayer entitled him to bring *quo warranto* against a street inspector, the city itself, however, being a corelator. It should be noted also that the words of the statute *"any person desiring to prosecute the same"* are broader than those of the District of Columbia statute.

In *State vs. Gates*, 43 Conn., 533, where *quo warranto* was brought against a member of the city council, the relator was

not only a resident and elector, but himself a claimant to the office.

GEORGIA:

(1) *Statutes*: Code of Georgia, 1911:

SEC. 5451. The writ of *quo warranto* may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein.

(2) *Decisions:*

Under the above statute a citizen and taxpayer has sufficient interest to maintain *quo warranto*.

Churchill vs. Walker, 68 Ga., 681.
Davis vs. City Council, 90 Ga., 817.
Crovatt vs. Mason, 101 Ga., 246.
Howell vs. Pate, 119 Ga., 537.
Hathcock vs. McGouirk, 119 Ga., 973.

IOWA:

(1) *Statutes:* Iowa Code:

SEC. 4316. If the county attorney, on demand, neglects or refuses to commence the same any citizen of the State having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and, upon obtaining such leave, may bring and prosecute the action to final judgment.

(2) *Decisions:*

State vs. Barker, 116 Iowa 96, 113:

Held that a citizen and taxpayer might bring an action to test the validity of the appointment of water-works trustees on the ground that the statute under which they were appointed was unconstitutional. It seems, however, that if the case had been one merely in which the right to hold office, as distinguished from the constitutionality of the law, had been involved the decision might have been otherwise. The court said (p. 99):

"A private citizen and taxpayer is undoubtedly interested in the duties required of the several public officials who are authorized to levy taxes. *This is not a contest over an office,* as were many of the cases cited in appellees' brief, but a matter of public interest in which relator had a special interest by reason of being a contributor to the funds. * * * *if this were a contest over the right to hold office, relator should have shown that he was elected or appointed to that office;* or if it had been an action to dissolve the corporation, perhaps he could not have maintained the suit. But it is neither, and under our statute there seems to be no doubt of his right to sue." [Italics ours.]

Accordingly, in *State vs. Heffelfinger,* 144 Iowa, 739, a proceeding between rival claimants to the same office was entertained.

LOUISIANA:

(1) *Statutes:* Wolff's Constitution and Revised Laws of Louisiana (1904):

2593. An action by petition may be brought before the proper district court or parish court by the district attorney or district attorney *pro tempore,* and for the Parish of Orleans by the Attorney General or any other person interested, in the name of the State, upon his own information or upon the information of any private party against the party or parties offending, in the following cases:

First. When any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this State; or

* * * * * * *

Garland's Revised Code of Practice of Louisiana (4th ed.), 1914:

Of the Mandate to Prevent an Usurpation of Office (Writ of Quo Warranto).

Art. 867. *Quo Warranto.*—This is an order rendered in the name of the State by a competent court, and directed

to a person who claims or usurps an office in a corporation, inquiring by what authority he claims or holds such office.

* * * * * * *

Art. 868. *When Writ Issues.*—This mandate is only issued for the decision of disputes between parties in relation to the offices in corporations, as when a person usurps the character of mayor of a city, and such like.

With regard to offices of a public nature, that is, which are conferred in the name of the State by the Governor, with or without the consent of the Senate, or by election, the usurpations of them are prevented and punished in the manner directed by special laws.

(2) *Decisions:*

In *State vs. Kohnke,* 109 La., 838, it was held that a citizen and taxpayer possesses sufficient interest in a municipal office to entitle him to bring *quo warranto* against an unlawful incumbent. Even in Louisiana, however, this right seems to be confined to officers of *corporations,* including municipal corporations. Officers appointed by the Governor with the advice and consent of the Senate are expressly excepted. (See *supra,* art. 868 and Terry *vs.* Stauffer, 17 La. Ann., 306, 311.)

Furthermore, in *State vs. Mason,* 14 La., 505, and *Voisin vs. Leche,* 23 La., 25, decided prior to the *Kohnke Case,* it was expressly held that even the general words of an earlier statute "any person," must be construed to mean person interested in the office, and suits by citizens and taxpayers were rejected, the court saying (14 La., 506-507):

> "It appears reasonable that no one but a person pretending to have a right to an office, should be permitted to contest the right of the incumbent of that office. If each citizen be entitled so to do, then a hundred or a thousand writs of *quo warranto* could be sued out."

* * * * * * *

Besides, "any person," used in this article, cannot have been used in an unrestricted sense. * * * This article means that "any person" having a sufficient *interest* to justify an action of *quo warranto,* may institute it, * * *.

* * * * * * *

* * * and we are of opinion that the first exception was well taken by the defendants, and that plaintiffs were not entitled to the writ of *quo warranto* in this case, because they do not pretend to be entitled to the offices from which they wish to oust the defendants.

MARYLAND:

The situation in Maryland is believed to be entirely unique.

In *Harwood vs. Marshall* (1856), 9 Md., 83, mandamus was held to be the appropriate remedy on the part of the claimant of an office to oust the incumbent and install himself, the suggestion being that *quo warranto* was inadequate to full relief.

In *Hawkins vs. State* (1895), 81 Md., 306, it was held to be not within the power or the duty of a *State's attorney* to institute *quo warranto* against a usurper of a public office, and further, that notwithstanding the language in *Harwood vs. Marshall,* the writ of *quo warranto* or information in that nature was non-existent in the State of Maryland.

Finally, in *Hummelsheime vs. Hirsch* (1910), 114 Md., 39, mandamus was held to be the proper remedy to oust the usurper of a municipal office, and might be prosecuted by a mere citizen and taxpayer in his own name, in all respects as a private suit.

Thus, we have the common-law remedy disowned, the right of the State in the person of its prosecuting officer denied, and the remedy afforded, without limitation or restraint, to a private citizen. It is a curious and irrational inversion of the prevailing rule.

NEW JERSEY:

(1) *Statutes.* Compiled Statutes of New Jersey (1709-1910), vol. 3, pp. 4210, 4212:

1. *Informations against usurpers of office or franchise; determination of several rights in same proceeding.*—In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise within this State, it shall be lawful, with the leave of the Supreme Court or a justice thereof, to exhibit in the Supreme Court in the name of the Attorney General an information in the nature of a *quo warranto, at the relation of any person desiring to prosecute*

the same, who shall be mentioned in such information to be the relator, against such person for usurping, intruding into or unlawfully holding and executing any such office or franchise, and to proceed therein in such a manner as is usual in cases of informations in the nature of a *quo warranto,* and if it shall appear to the court or justice, that the several rights of divers persons to the same office or franchise may properly be determined on one information, the court or justice may give leave to exhibit one such information against several persons, in order to try their respective rights to such office or franchise (P. L., 1903, p. 375).

* * * * * * *

4. *Proceedings against person unlawfully holding municipal office.*—Whenever it is alleged that any person usurps, intrudes into or unlawfully holds or executes any municipal office or franchise within this State, any citizen of this State, who believes himself lawfully entitled to such office or franchise, may, as relator, file in the office of the clerk of the Supreme Court an information in the nature of a *quo warranto,* against such person, for usurping, intruding into or unlawfully holding or executing any such office or franchise, and may proceed therein in such manner as is usual in cases of informations in the nature of a *quo warranto,* except as is otherwise provided in this act (P. L., 1903, p. 377).

(2) *Decisions:*

The following cases in New Jersey hold that a citizen and a taxpayer may be a relator in *quo warranto* to challenge the title of a public officer:

State vs. Hammer, 42 N. J. L., 435.
State vs. Tolson, 33 N. J. L., 195; 44 N. J. L., 667.
Oliver vs. Jersey City, 63 N. J. L., 96; 63 N. J. L., 634.
State vs. Bedell, 67 N. J. L., 148.

Even in these cases, however, the permission of the Supreme Court or the justice thereof first had to be obtained, and in *Tillyer vs. Mindermann,* 70 N. J. L., 512, the court, in the exercise of its discretion, refused to entertain an action even by a rival claimant to a contested office, Mr. Justice Pitney saying that—

> "No public interest would be subserved by granting leave to the relator to file an information in the name of the Attorney General. On the contrary, it is plain from the evidence that the public business has already been much incommoded by the pendency of this controversy. Further litigation ought not to be encouraged."

Furthermore, it should be noted that the words of the statute are broader than those of the District of Columbia statute, in that it uses the phrase "any person or persons, desiring to sue or prosecute the same."

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 813.

OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA, EX REL., WILLIAM J. FRIZZELL.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

The proceeding is in *quo warranto* to test the right of the plaintiff in error to hold the office of Commissioner of the District of Columbia, to which he was appointed from civil life by the President June 26, 1913, and confirmed by the Senate July 26, 1913, under a statute which created such office and declared the qualifications of those who might be appointed as follows:

> "The two persons appointed from civil life shall at the time of their appointment be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else."

The relator charges that the plaintiff in error at the time of his appointment had not been an actual resident of the District of Columbia for the three years next before his appointment, and had during that period claimed residence elsewhere.

The claims of the plaintiff in error, respondent to the writ, made by objections to the granting of the writ, (Rec., p. 1), demurrer to the petition, motion to quash the writ, (Rec., pp. 17, 18), and by exception taken to the refusal of the trial judge to charge the jury as requested, may be briefly stated as follows:

First, That the writ of *quo warranto* to try the title to a municipal office in the District of Columbia may issue only at the suit of the Attorney General or the District Attorney.

Second, That the relator as a citizen and taxpayer has no legal standing to apply for the writ after refusal of the public law officers to sue for the same.

Third, That the District Attorney did not *personally* refuse to bring the proceeding, the written refusal attached to the petition having been signed by an assistant district attorney "in charge" in the absence of his superior.

Fourth, That the appointment and confirmation to the office are conclusive that the appointee was qualified for such appointment, and that this question "cannot be reviewed by any judicial authority." (Rec., pp. 2, 17, 18, 32, 72.)

Fifth, That he was entitled to have the jury instructed to find in his favor on the issue of residence.

The first, second and fourth of the foregoing propositions were overruled by the Court of Appeals on an appeal by the relator from a judgment sustaining a demurrer to the petition, (see Opinion, Rec., pp. 83, et seq.), while the fourth and fifth were overruled by that court on an appeal by the plaintiff in error from

judgment of ouster entered upon the verdict of a jury on the issues of fact. (Opinion, Rec., p. 58.) The *third* objection we assume will hardly be insisted upon in view of the fact that in his written objections to the issuance of the writ the respondent urged as a reason why the writ should not issue:

> "That the Attorney General of the United States and the United States Attorney for the District of Columbia *have both refused* to file the petition in *quo warranto* asked for by the proposed relator" (Rec., p. 6).

At the trial the District Attorney testified that he knew of the letter of his assistant "in charge" at about the time it was written and approved his action (Rec., p. 40).

ARGUMENT.

I.

The Motion to Dismiss the Writ of Error.

This Court, it is submitted, is without jurisdiction of the cause on writ of error, since there was not drawn in question

(a) the construction of a law of the United States; or

(b) the validity of any authority exercised under the United States; or the existence or scope of any power or duty of an officer of the United States; or

(c) the jurisdiction of the trial court.

A brief for the relator upon the motion is upon file and its argument will not be repeated.

II.

The right to institute quo warranto proceedings against a municipal officer whose qualifications are defined by positive law, is not confined to the Attorney General and District Attorney, but may be allowed by a judge of the Supreme Court of the District of Columbia on the application of an interested person after refusal of the law officers to take action.

The Statute.

Sections 1538 to 1548 of the Code of Laws for the District of Columbia contain all the local statutory law upon *quo warranto*. Prior to the enactment of the Code, which took effect January, 1902, the proceeding by *quo warranto* had been held to be unknown to the District of Columbia.

(*Torbert v. Bennett,* 24 Wash. Law Rep., 149, 156.)

Code Sections 1538, 1539, 1540, 1541 and 1544, which alone appear pertinent, are as follows:

> Sec. 1538. AGAINST WHOM ISSUED.—A *quo warranto* may be issued from the Supreme Court of the District in the name of the United States—
>
> *First.* Against a person who usurps, intrudes into, or unlawfully holds or exercises within the District a franchise or public office, civil or military, or an office in any domestic corporation.
>
> *Second.* Against any one or more persons who act as a corporation within the District without being duly authorized, or exercise within the District any corporate rights, privileges, or franchises not granted them by the laws in force in said District.
>
> And said proceedings shall be deemed a civil action.
>
> Sec. 1539. WHO MAY INSTITUTE.—The Attor-

ney-General or the District Attorney may institute such proceeding on his own motion, or on the relation of a third person. But such writ shall not be issued on the relation of a third person except by leave of the court, to be applied for by the relator, by a petition duly verified, setting forth the grounds of application, or until the relator shall file a bond with sufficient surety, to be approved by the clerk of the court, in such penalty as the court may prescribe, conditioned for the payment by him of all costs incurred in the prosecution of the writ in case the same shall not be recovered from and paid by the defendant.

Sec. 1540. IF ATTORNEY-GENERAL AND DISTRICT ATTORNEY REFUSE.—If the Attorney-General and District Attorney shall refuse to institute such proceeding on the request of a person interested, such person may apply to the court by verified petition for leave to have said writ issued; and if in the opinion of the court the reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of said interested person, on his compliance with the condition prescribed in the last section as to security for costs.

Sec. 1541. RELATOR CLAIMING OFFICE.—When such proceeding is against a person for usurping an office, on the relation of a person claiming the same office, the relator shall set forth in his petition the facts upon which he claims to be entitled to the office.

Sec. 1544. PLEADING.—The defendant may demur or plead specially or plead "Not guilty" as the general issue, and the United States may reply as in other actions of a civil character; and any issue of fact shall be tried by a jury if either party shall require it, otherwise it shall be determined by the court.

Nowhere in these sections is there a word or phrase to distinguish between proceedings against usurpers

of public and of private offices. The right of the persistent relator to have the writ depends only on the opinion of the court that the reasons set forth in the petition "are sufficient in law." Had it been intended to limit the right of the persistent relator to inquire into the holding of office *in private* corporations, and deny all right of inquiry into alleged usurpations of *public* offices except to the Attorney-General and district attorney, it would have been easy to say so. The absence of such words of distinction is an argument against a purpose to distinguish. The Code, too, was adopted after the decision of this Court that the private citizen has standing to seek the performance of a public duty (*Union Pacif. R. R. Co. v. Hall*, 91 U. S., 343, decided 1875), and of the Court of Appeals of the District that a taxpayer has standing, as such, to secure an injunction against threatened public wrong (*Downing v. Ross, et al.*, 1 App. D. C., 251, 253, decided 1893).

The statute must be considered as adopted in the light of these judicial decisions, and to have been intended to accord therewith, as also with the construction given for two hundred years to the statute of Anne (enacted 1711, High on Ex. Rem., Appendix A), under which it was always held that the right of an alleged usurper of municipal office might be tested by a private relator.

Again, we suggest that under our statute the proceeding to test the right of holders of office in *private* corporations does not differ from that to test the right to *public* office. In either case, the Attorney-General and district attorney must first be applied to, and in neither case may the private relator obtain the writ without the leave of the court. The argument of Justice Van Orsdel on this proposition, found in the opin-

ion of the Court of Appeals (Rec., pp. 84, *et seq.*), is unanswerable and we are content to rest upon it.

III.

A Citizen Taxpayer Has Such Interest in the Office of Commissioner of the District of Columbia that He Must be regarded as a "Person Interested" and entitled to apply for a Quo Warranto in Respect of that Office.

The Commissioners of the District of Columbia are the governors thereof, with statutory powers to enact building, health, police, and traffic regulations or ordinances, and impose penalties for their infraction, fix annually the rate of taxation, enter into contracts which bind taxpayers, appoint officials for municipal service, and do many other things directly affecting the citizen and the taxpayer. He is vitally interested in the office.

The statutes in the States differ widely in language but it is believed that where the *quo warranto* statutes do not in terms confine the right to sue out the writ to the public law officers, as is the case in New York, West Virginia, Ohio, Missouri, Florida, Oregon, Michigan and Illinois, for examples, the great weight of authority has established the rule that any citizen taxpayer is a person interested to such extent that he may sue in *quo warranto* to oust an unlawfully appointed or elected incumbent of a municipal office. It is so held in all the following cases:

State ex rel. Mitchell vs. Tolan, 4 Vroom., 195, 199;

State ex rel. Richards vs. Hammer, 42 N. J. Law, 435;

State ex rel. Hann vs. Bedell, 67 Ib., 148;
State, ex rel., etc., vs. Martin, 46 Conn., 479;
State ex rel., etc., vs. Vail, 53 Mo., 97, 110;
Davis vs. Dawson, 90 Georgia, 817;
Covatt vs. Mason, 101 Ib., 246;
State vs. Kohnke, 109 La., 838; overruling 23 La. An., 25;
State, ex rel., etc., vs. Barker, 116 Iowa, 96;
S. C., 57 L. R. A., 244;
State vs. Hall, 111 N. Car., 369;
Pike Co. vs. People, ex rel. Metz, 11 Ill., 202;
State, ex rel. Keliher vs. Fordyce, 115 Wis., 608;
State, ex rel. William vs. Samuelson, 131 Ib., 499;
People, ex rel. Barton vs. Londoner, 13 Colorado, 303, 314;
S. C., 6 L. R. A., 444;
Commonwealth vs. Meeser, 44 Pa. St., 341.

These decisions, many of which are reviewed by the Court of Appeals, are in harmony with the decision of this Court in the mandamus case of *Union Pacif. R. R. Co. vs. Hall,* 91 U. S., 343, and with the English decisions:

King vs. White, 5 Ad. & E., 613; 31 E. C. L. Rep., 753;
King vs. Parry, 6 Ad. & E., 810; 33 Ib., 424;
Queen vs. Quayle, 11 Ib., 508; 39 Ib., 279.

"The text-books, it is believed, unanimously support the doctrine stated as follows by Mr. Mechem:

> 'The interest of a citizen as a taxpayer is sufficient to authorize him to institute an inquiry into the title of one who assumes to exercise the functions of a municipal office. All that the court requires in such cases, it is said, is to be

satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct with respect to the election or appointment he seeks to impeach.'

Mechem on Public Officers, sec. 490.

"But every citizen of a town has an interest in its municipal offices which will support a *quo warranto* to test the right of an incumbent thereto.

7 Lawson's Rights, Rem. & Proc., sec. 4012.

See, also—

High on Ex. Rem., secs. 701, 702;
Paine on Elections, sec. 873;
Throop on Pub. Officers, sec. 781.

It was claimed for respondent in the courts below that only one who might *claim the office* should be regarded as a person interested. But this contention can apply only to elective offices, for "no person could show that if an incumbent of any certain appointive office was found ineligible, and for that reason ousted from the place, he would be entitled to or would become a successor," and it leads to the absurd conclusion, since there are no elective offices in the District of Columbia, that the provisions of Code Sections 1539 and 1540, respecting interested persons may never be put to use.

The quotation from *State vs. Dahl,* 69 Minn., 108, found in the opinion at p. 88 of the record, is very pertinent.

In Kansas, Nebraska and Indiana the writ may be had only by the public law officers or by a *citizen claiming the office.*

We submit the views of some of the courts whose decisions we have cited.

The case from 46 Conn., p. 479, was *quo warranto* to oust a street inspector, brought by the City of Waterbury and a tax payer. The court said:

> "It is quite unnecessary to determine or even consider the question whether the city in its corporate capacity can sue for this writ; for Eugene S. Wyman is a co-relator alleging that he is a taxpayer in the city. As such he is interested in having the duties annexed to the several public offices recognized by the city charter performed by persons legally elected thereto, and so entitled upon this proceeding to a determination as to the right of the respondent to exercise the office which he has assumed, although no other person now claims it."

The Connecticut statute empowered the Superior Court to authorize the writ in the name of the State's attorney "at the relation of any person desiring to present the same" (Conn. Gen. Stat., sec. 1026).

In the Missouri case (*State ex rel. Atty. Gen. vs. Vail*, 53 Mo., 97), the statute is stated to be as in Connecticut, being said by the court (p. 109) to be in most respects a literal copy of the Statute of Anne," but it was said: "Neither here nor under the Statute of Anne is the relator necessarily a claimant of the office alleged to be usurped," and approved the English decision (*Tancred*, p. 45), that "when the relator appeared to be an *inhabitant* of Harborough he had sufficient interest to entitle him to an information questioning the right of the defendant to the place of a chief burgess."

The code of Georgia provided:—

> "The writ of *quo warranto* may issue to inquire into the right of any person to any public office, the duties of which he is in fact discharging; but must be granted at the suit of some

person either claiming the office or interested therein."

Held: "Every citizen of a town has an interest in its municipal offices which will support a *quo warranto* to test the right of incumbents thereto."

Davis vs. City Council, 90 Ga., 821.

In Iowa the statute provides that if the county attorney on demand neglects or refuses to bring *quo warranto*, "any citizen of the State having an interest in the question," may by leave of court do so.

Held in *quo warranto* against water-works trustees that—

> "a private citizen and taxpayer is undoubtedly interested in the duties required of the several public officials who are authorized to levy taxes. This is not a contest over an office * * * but a matter of public interest in which relator has a special interest by reason of being a contributor to the funds."

State ex rel. White vs. Barker, 116 Iowa, 96, 99.

In North Carolina the statute provides that the action "may be brought by the Attorney General in the name of the State, upon his own information, or upon the complaint of any private party," etc.

In a proceeding to test the right of one holding the office of Chief of Police of Greensboro, brought by a "voter and taxpayer," by leave of the Attorney General, the court sustained the action, saying:

> "These offices are created by law for the benefit and convenience of citizens, and if any usurper should assume their duties, any citizen, whose rights are thus violated, may seek to have the usurper evicted, though he may not claim for himself a right to the office or its fees" (citing

Churchill vs. Walker, 68 Georgia, 681; *State vs. Jenkins,* 25 Mo., 484; *State vs. Hammer,* 42 N. J., 435). "Indeed, the recognized principle in Great Britain and this country (except in a very few States) is that the proceeding may be begun by leave of the Attorney General upon the relation of *any person possessed of such an interest as renders his interference not obtrusive,* as for instance, an inhabitant or taxpayer or voter of a city or town, in a proceeding to test the right of one claiming to exercise the duties of an officer thereof. * * * Indeed the right of private relators to bring such actions was not restricted in England by requiring leave of the court officer till Statute 9 Anne, chapter 20."

State vs. Hall, 111 N. C., 369.

In the Louisiana case cited, which was *quo warranto* against members of the sewerage and water board of New Orleans, in which the only interest alleged by the relator was that of resident taxpayer the court, after stating that the State statute "is substantially an adoption of the common law on the subject, as modified by the Statute of 9 Anne, c. 20," reviewed the authorities, sustained the action, overruled a previous decision, and said:—

"There never was any question under the Statute of Anne that a private person without any other interest than such as was shared by all the inhabitants of the town or borough was qualified by himself, and without intervention of the law officers of the State, to stand in judgment in the writ, when the purpose was to settle rights to an office in a municipal corporation."

State ex rel. Saunders vs. Kohnke, 109 La., 838.

The New Jersey statute is like that of North Carolina and provides that the Attorney General by leave of the court, and "at the relation of any person or persons desiring to sue or prosecute the same," may sue out the writ. In a proceeding against members of the board of assessment and revision of taxes in Newark, brought by a resident taxpayer, the court said:—

> "The objects here in litigation are public offices, and are therefore things of public concern, in which every resident of the city of Newark has an interest, and I know not how the suit of a taxpayer of that locality is to be repulsed when the ground of complaint is—for such is the allegation—that the assessment and revision of taxation which affects his property is in unauthorized hands. All that the court requires, in such instance, is to be satisfied that the relator is of sufficient responsibility, is acting in good faith and not vexatiously, and has not become disqualified by his own conduct, with respect to the election that he is seeking to impeach. The authorities are numerous to this purpose."
>
> State ex rel. Richards vs. Hammer, 52 N. J. Law, 435.

If then, as declared by these numerous courts of last resort, it was for more than one hundred years before the adoption of this statute for the District of Columbia the rule that as to municipal offices any citizen taxpayer was entitled to maintain *quo warranto* as an interested person, will it now be held that this resident taxpayer was without standing to ask the leave of the court to take action for the protection of his rights?

The distinction between *municipal* and *political* offices is recognized by all the decisions. Our claim goes

no further than that the taxpayer is an "interested person" as to all municipal offices.

It is submitted that under the local statute there can be no doubt that the relator pursued his right in applying to the Court for the writ, and that it was lawfully issued. In holding otherwise, when he allowed the demurrer to the petition, Mr. Justice Anderson read into the statute what it does not contain, and made it a useless thing.

The proposition was settled by this Court in the mandamus case of *Union Pacif. R. R. Co. vs. Hall*, 91 U. S., 343, 354, in which it was said:

> "In this country there has been diversity of decision upon the question whether private persons can sue out the writ to enforce the performance of a public duty unless the non-performance of it works to them a special injury; and in several of the States it has been decided that they cannot. * * * There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty not due to the government as such, without the intervention of the government law officer. *People vs. Collins*, 19 Wend., 56; *County of Pike vs. The State*, 11 Ill., 202; *Ottawa vs. The People*, 48 id., 233; *Hamilton vs. The State*, 3 Ind., 452; *Hall vs. The People*, 57 N. Y., 307; *People vs. Halsey*, 37 id., 344; *State vs. The County Judge of Marshall*, 7 Iowa, 186; *State vs. Railway*, 33 N. J. Law, 110; *Watts vs. Carroll Parish*, 11 La. Ann., 141. See also *Dillon on Mun. Corp.*, sec. 695, and *High on Ex. Rem.*, sects. 431, 432; *Cannon vs. Janvier*, 3 Honst., 27; *State vs. Rohway*, 33 N. J. Law, 110. The principal reasons urged against this doctrine are that the writ is prerogative in its nature—a reason which is of no force in this country and no longer in England—and that it exposes a defendant to be harassed with many suits. An

answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted."

See also *Crampton vs. Zabriskie*, 101 U. S., 601.

IV.

Does Confirmation by the Senate of an Appointment by the President Bar Judicial Inquiry Into Eligibility of the Appointee Under the Act of Congress Which Created the Office?

The claim of the respondent is as broad as the question. He has stated it in slightly varying terms, but nowhere more distinctly than in his demurrer to the petition for *quo warranto*, in which he asserted (Rec., p. 18):

> "The right to appoint Commissioners for the District of Columbia and to determine the qualifications of such appointees rests exclusively in the President and Senate of the United States *without any power of judicial review* and any judicial review would be an infringement upon the powers of a coordinate branch of the Government."

The proposition is, then, that the President and the Senate may, in an appointment to office, ignore, if they will, express provisions of an Act of Congress prescribing qualifications, and the appointee be secure from inquiry by the Courts! It is new doctrine that a statute validated by the joint action of the House of Representatives, the Senate and the President may be repealed by the President and the Senate.

The power to appoint to office is not inherently an executive function and belongs to the President only

when conferred by law. It may be exercised as well by either of the other departments of government if a statute so provides.

> "It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary."
> *Fox vs. McDonald* (Ala.), 21 L. R. A., 529, 535, 536.

The office in question was created by the act of 1878, and the executive power to appoint commissioners *came only from that statute.* Discretion in selection was given the President *subject to two limitations,* which required: (a) that the appointees must be citizens of the United States; (b) that they must have been "actual residents of the District of Columbia for three years next before their appointment, and have during that period claimed residence nowhere else."

The right of choice was thus confined to a class, and persons not within that class were and are disqualified from holding the office and discharging the functions of Civil Commissioner. The non-resident is as much disqualified as the alien; no more. The writ here is not directed against the executive, but seeks to oust the respondent *as one disqualified by law to receive the executive appointment.* Congress has declared that the alien or the non-resident may not exercise the functions of that particular office.

Do the appointment and confirmation establish qualifications which did not exist and render him capable to receive appointment whom the statute disqualifies from receiving it?

To affirm this is to declare that the disqualified alien candidate for elective office may point to his majority at the polls as a conclusive answer to a *quo warranto*, on the ground that the voters have by their ballots determined that he is qualified.

If the statute had provided that women should be appointed to this office would appointment and confirmation of a man conclusively establish him to be of the other sex?

> "We have no office in this Government from the President down to the most subordinate agent who does not hold office under the law with prescribed duties and *limited authority*. And while some of these, as the President, the legislature and the judiciary exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law *with duties and powers prescribed and limited by law.*"
>
> Floyd Acceptances, 7 Wall., 666, 676.
>
> See also, *Yick Wo. vs. Hopkins,* 118 U. S., 356.

The eligibility of one to hold the governorship of a State to which he had been elected was inquired into by *quo warranto* by the Supreme Court of Wisconsin.

> Atty. Gen. vs. Barstow, 4 Wis., 567;
>
> High on Ex. Rem., sec. 634.

For an able presentation of the argument against conclusiveness of the appointment and commission, see *State ex rel. Atty. Gen. vs. Vail,* 53 Mo., 97, 108.

The Claim of Invasion of Executive Discretion.

No question of judicial invasion of executive discretion is here involved. The statute did not impose on the President a duty to take testimony and determine facts and rights therefrom, and this is no review of conclusions reached by him under authority of law. It is not an attempt to control his action, for he is not a party to the proceeding, which is directed against the appointee as one not qualified under the law to hold the office. This being so, *Marbury vs. Madison, Dudley vs. James* (83 Fed., 345), *Com. of Patents vs. Whiteley* (4 Wallace, 522), *Mississippi vs. Johnson* (4 Wall., 475), *Keim vs. United States* (177 U. S., 290), and others like them, cited by plaintiff in error, have no bearing upon the question. They sought to coerce or prohibit executive action; in the case at bar it is sought only to oust from office one who was ineligible to appointment.

We respectfully submit that to deny to the courts the right to inquire if an appointment to public municipal office is in violation of law, is to declare the existence of that arbitrary power in the executive for which this Court has declared there is no room in our theory of government.

The respondent complains that "presidential and senatorial action" were treated "as without even evidential value" by the courts below. The record does not sustain that complaint. We recognized from the beginning that his nomination by the President and his confirmation by the Senate established Mr. Newman's *prima facie* right to the office which he held, and we conceded that it was incumbent upon us to repel, by satisfactory evidence, the presumption thus created in his favor. That, indeed, was not the original rule in a *quo warranto* proceeding, for, anciently, whenever that

writ was issued against the incumbent of an office he was required to establish his title, and the burden of doing so rested on him; but the proceeding has been so altered and so liberalized by the statute that the old rule no longer prevails. We instituted and we tried this case upon the theory that we were required to overcome Newman's *prima facie* right, arising out of the President's nomination when confirmed by the Senate, and we assumed the burden of proving that he was not eligible under the statute.

We are familiar with the line of decisions which declare the very sensible doctrine that where the law imposes upon any officer a duty it is presumed that the duty thus imposed was properly performed. That presumption, however, is a *prima facie,* and not a conclusive one. To treat it as conclusive would leave our public officers to disregard the law at their own will, and their acts, though plainly contrary to the statute, would be binding upon all citizens.

We freely admit that the courts of this country are justified in assuming, with no evidence before them to the contrary, that every executive officer has performed his duty according to the law, but we utterly reject the doctrine which denies a citizen the right to allege and prove that public officers have not acted in conformity with the law.

V.

The Cause was Properly Submitted to the Jury. An Instructed Verdict for Respondent Was Impossible Under the Evidence.

The statute makes this a civil action and gives the respondent to the writ the right to demur or plead to the petition. After his unsuccessful demurrer he pleaded in substance as follows:

1. Required proof that the relator is a citizen of the United States and a taxpayer in his own right.

2. Denied that he was not qualified, and affirmed that he had been an actual resident of the District of Columbia for three years, and had claimed residence nowhere else.

3. Denied refusal of the U. S. Attorney to institute *quo warranto*.

4. Repeated his legal objection that the action of the Senate in confirming him was conclusive.

5. Not guilty in manner and form as charged.

(Record, pp. 31, 32.)

The relator joined issue upon the pleas. Upon trial the relator assumed the burden of proof as under the law he was bound.

People vs. Platt, 50 Hun., 466;
State ex rel. vs. Hunton, 28 Verm, 594;
Rolling Stock Co. vs. People, 147 Ill., 234, 246;
State ex rel., etc., vs. Kupferle, 44 Mo., 157;
State vs. Brown, 34 Miss., 688;
17 *Ency. Pl. and Pract.*, p. 388 and note.

Relator proved that he was a citizen and taxpayer; that he had applied to the district attorney and that his application had been rejected, as shown, and then proved by the respondent that he had not been a resident of the District of Columbia for three years before his appointment on June 26, 1913, and had been a non-resident from July, 1911, to March 3, 1913, a period of twenty months. Respondent testified in substance that at all times during that absence he had the intention to return to Washington as to a home, and proved his own declarations to others to that effect. This issue of residence was the only contested issue of fact before

the jury. The Court rejected all the prayers asked on both sides without passing upon their propositions, preferring to cover the case with his charge (Rec., p. 54).

The issue of actual residence for three years was submitted to the jury under instructions which embodied all the principles contended for by appellant in his prayers directed to that subject, and were more favorable than he was entitled to have them. He did not except to the charge as given.

The gravamen of respondent's prayers on the subject of residence, Nos. 1, 8, 9, and 12, is found in the last of these (Rec., pp. 50, 51, 52). It is that if when Mr. Newman left the District in July, 1911, it was for a temporary purpose and with the intention to return, and that during such absence this original intention continued, and that he had no intention to establish a domicile elsewhere, and during his absence he had not claimed residence elsewhere, the verdict should be for him. Prayers Nos. 2, 3, 10, and 11 deal with the weight and consideration to be given certain testimony bearing upon the questions of fact to be found under Nos. 1, 8, 9, and 12.

Compare with these last enumerated prayers the charge of Judge Gould and his terse statement of the questions submitted and it will be found that appellant got all he asked in those prayers. The court said (p. 56):

> "Two questions arise to be determined by you. * * * The first is, when Mr. Newman left in the middle of July, 1911, did he leave with the intention of returning to this as his home? Did he go away with the idea that when he completed his work which he had agreed to perform he would come back to this as his abiding place?"

And stating the second question he said:

> "The question for you also to determine is, Was Mr. Newman's absence from the city, from the middle of July, 1911, to either November, 1912, or March, 1913, such an unreasonable absence from the city, under all the circumstances of the case, as to indicate to your minds abandonment of his actual residence here to the extent that he has not the right to be deemed to have been an actual resident for three years prior to his appointment? * * *
>
> "I leave these two questions to you—his intention of returning when he left, and the duration and character of his business in determining the question whether he is entitled to consider the period of his absence as a part of the three years prior residence required of him under the law" (Rec., pp. 56, 57).

Apparently recognizing that this charge gave in substance what they had asked, appellant's counsel took no exception thereto. If it did not omit or declare contrary to some matter of substance found in the specific prayers counsel may not complain of the rejection of those prayers. In the Court of Appeals they did not point out or suggest such omission or inconsistency.

That the evidence warranted and required the submission of the question of actual residence to the jury must be conceded, for it was admitted and shown that the respondent was in fact absent from the District from July, 1911, to March 3, 1913, a period of about twenty months, part of the three years. From July, 1911, to March, 1913, say twenty months, part of the thirty-six months required for the actual residence of the appointee, no member of his family was here, and his and their place of abode was in Chicago, where

the respondent had established for himself and them what at least bore the appearance of a home, a domicile.

> "They lived first in a furnished flat, then a little family hotel, then a boarding house, then a furnished flat in Evanston" (Rec., p. 43). "His household consisted of really two families, witness' wife, boy, and himself, and wife's father and mother, all occupying the same dwelling" (Rec., p. 41).

During this period of twenty months Mr. Newman was in Washington about five times all told; "twice in the fall of 1911, and winter of 1911-12, just a day or two each time, staying with friends," and "at least three times in the winter of 1912-13, remaining just over Sunday, or a day" (Rec., p. 41).

As against these physical facts were only respondent's declarations of intention and purpose to consider himself a resident of Washington. Surely the question whether that intention in fact existed and continued during the prolonged physical absence of the respondent was for the jury and could not rightfully have been taken from them by the judge as asked by the appellant's thirteenth prayer!

Effect of the Verdict.

The verdict then necessarily established either (a) that when respondent left Washington he did not have the purpose to return as to a home; or (b) that this purpose was abandoned, and a domicile established elsewhere.

The case then is reduced to this: Is one to be deemed an actual resident during a period of three years who for twenty months of that time, was in fact absent from the locality without intention to return, and with no

apparent tie of family or property to induce a return? There can be but one answer.

ACTUAL RESIDENCE.

In the light of the verdict we hesitate to discuss the distinctions between "residence," actual residence and "domicile," for Mr. Newman's actual absence was conceded, and his claim of intention to return, as a substitute for presence in the District was negatived by the verdict.

The Court of Appeals has most industriously and ably collected and reviewed the authorities (Rec., pp. 61, *et seq.*). The dissenting opinion wholly fails to distinguish between domicile and residence, although it quotes from *Mitchell vs. U. S.*, 21 Wall, 351, which clearly makes the distinction.

Actual residence" has, we believe, always been held to import *physical presence*, the courts having found no more definite terms in which to express that idea.

Residence has been elsewhere variously defined as follows:

> "It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there."
>
> In re Collins, 64 How. Pr., 63.

> "According to the best authorities I can find 'residence' means a person's habitual physical presence in a place or country which may or may not be his home."
>
> In re Banff Election, 4 N. W. Ter., 140, quoted 24 Ency. A. & E. Law, 693.

"Residence generally imports a personal presence, whereas one may have a domicile in a place from which he is absent most of the time."
The Chinese Tax Cases, 14 Fed., 338, 344.

"Literally a resident is one who sits, abides, inhabits or dwells in a certain place."
Collinson vs. Teal, 4 Sawyer, 241.

A resident is "one dwelling or having his abode in any place, an inhabitant, one that resides in a place."
Roosevelt vs. Kellogg, 20 Johns., 210.

The act of abiding or dwelling in a place for some continuance of time.
Long vs. Ryan, 30 Gratt., 718.
Crawford vs. Wilson, 4 Barb., 504, 523.

In this Court are two decisions of controlling importance.
Penfield vs. Ches. Ohio & S. W. R. R. Co., 134 U. S., 351.
Barney vs. Oelrichs, 138 U. S., 529.

In these cases the Court cited with approval many cases in which residence is distinguished from domicile, among them *In re Thompson*, 1 Wend., 149, an attachment proceeding against a non-resident, in which Ch. J. Savage said the question was, "*Where was his actual residence, not his domicile?*" and "No length of residence without the intention of remaining constitutes domicile."

And this Court also approved *Frost vs. Brisbin*, 19 Wend., 11, 14, in which Ch. J. Savage said that if the case turned upon the defendant's *formed intention and purpose of mind and not upon the fact of actual residence*, the law was with him, but that *intention could*

not constitute residence, and that "the domicile of a citizen may be in one State or territory and his *actual residence in another.*"

And the distinctions thus accepted and approved by this Court have been frequently declared by State Courts of last resort. In *Campbell vs. White,* 22 Mich., 196, the Supreme Court of Michigan, in passing upon the phrase "and reside out of the State" in a statute of limitations, said:

> "The phrase must be understood as importing something so distinct, definite, and fixed as to constitute the party's home, the place of permanent abode which, whenever left temporarily or on business, the party intends to return to, and on returning is at home."

And the court quoted with approval the language of Ch. J. Bosworth in *Chaine vs. Wilson,* 1 Bosw. (N. Y.) 673:

> "Ordinarily one's residence and domicile (if they do not always mean the same thing) are in fact the same, and where they so concur they are that place which we all mean when we speak of one's home; and it may safely be asserted that where one has a *home* as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort, rest and relaxation from the cares of business and restoration of health, and there abides in the intervals when business does not call, *that is his residence both in the common and legal acceptation of the term.*"

Apply these tests to the case in hand and there can be no doubt that during the twenty months of Mr. Newman's absence he was a resident of the city of Chicago and its suburb, Evanston.

While the decisions cited have been usually in

attachment or divorce proceedings, or in the application of acts of limitation, it would seem that in cases such as this the distinction between domicile or constructive residence and actual residence should be even more clearly recognized.

State vs. Savre, 129 Iowa, 122;
S. C., 113, Am. State R., 452;
People vs. Ballhorn, 100 Ill. App., 571.

In the last cited case the facts were as follows:

A statute provided that no person should be eligible to the office of alderman unless he should be a qualified elector and reside within the ward for which he was elected, and that the office should become vacant upon the incumbent ceasing to be an inhabitant of the precinct for which he was elected. Ballhorn, after his election, removed his family to a house in another precinct and rented to another his former dwelling, but intended to return to it as soon as his business would permit. On *quo warranto* he was ousted. The court treated the terms "shall reside within" and "be an inhabitant of" as equivalent in meaning and declared for greater strictness in construing the residence required of office holders to mean an actual residence or physical abiding place than is necessary or important in construing the same or similar terms in other statutes, saying:

> "Sound public policy requires that those who represent the local units of government shall themselves be component parts of such units. The purpose of these statutes is to effectuate this wise policy. And this policy can only be truly served by requiring such representatives to be and remain actual residents of the units they represent in contradistinction from constructive residents. A mere constructive resident has

> no better opportunities for knowing the wants and rightful demands of his constituents than a non-resident and is as much beyond the wholesome influence of direct contact with them."

It is not contended that the appointee must have remained constantly within the District for the three years. Casual absences for recreation or temporary business will not interrupt residence, and are to be excluded from consideration.

Barney vs. Oelrichs, 138 U. S., 529.

We concede that there are some decisions which take a contrary view, and there are many that hopelessly confuse or fail to observe the obvious distinction between *domicile* and *residence,* but they are not in harmony with each other, and some of them are directly opposed to the views expressed by this Court in the cases cited.

We submit that there is no error in the judgment of the Court of Appeals and that it should be affirmed.

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Office Supreme Court, U. S.
FILED
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JAMES D. MAHER

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 813.

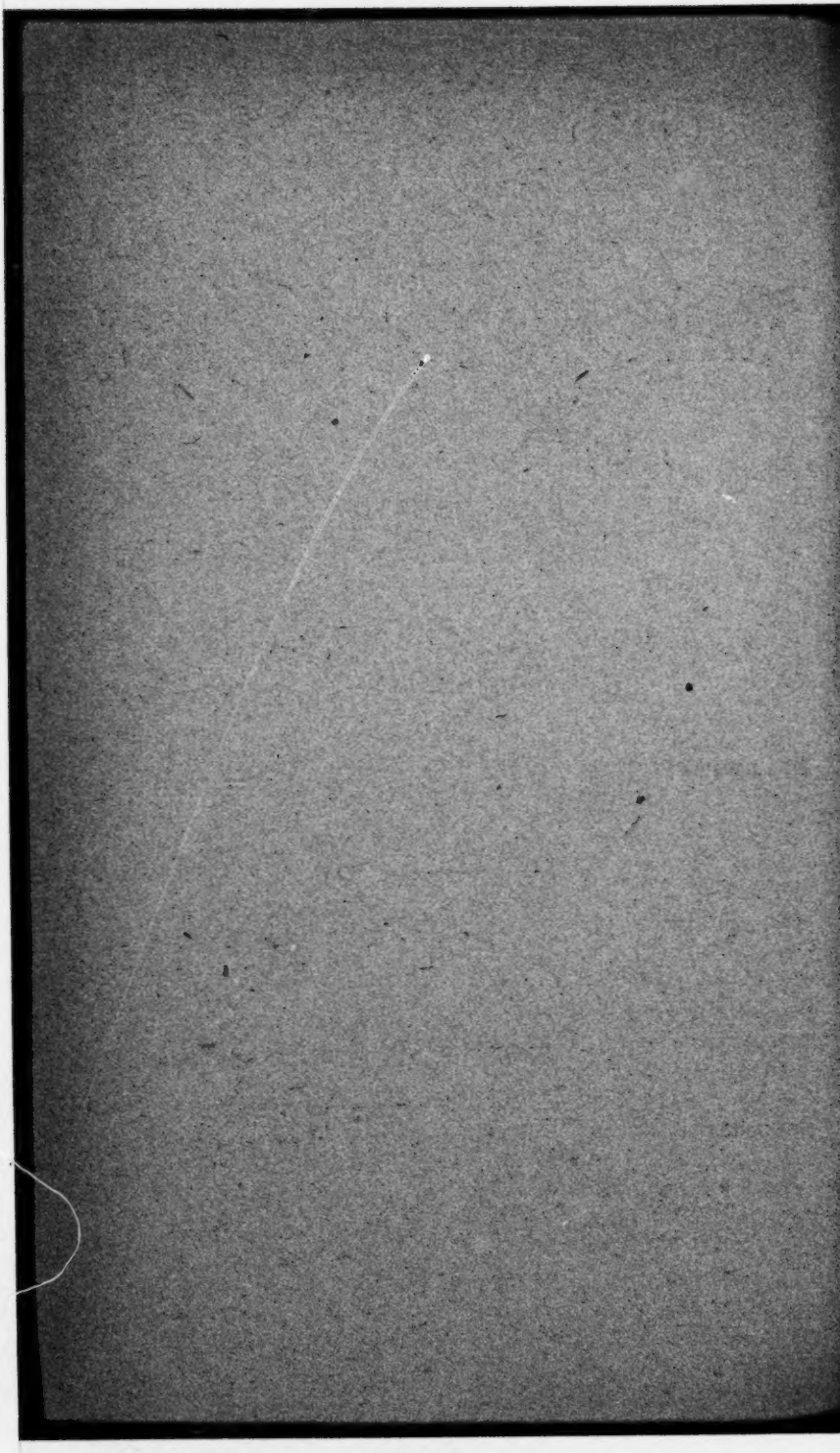
OLIVER P. NEWMAN, PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA *ex Rel.* WILLIAM J. FRIZZELL, DEFENDANT IN ERROR.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

JOSEPH W. BAILEY,
ARTHUR A. BIRNEY,
WILLIAM J. NEALE,
Attorneys for Defendant in Error.



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DEFENDANT IN ERROR'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

This case is already pending in this court upon a writ of error, and the fact that the plaintiff in error now applies for a writ of certiorari is tantamount to a confession that the motion to dismiss the writ of error ought to be granted. Considering the vast amount of labor which this court must necessarily perform, a due regard for its time would induce members of its bar to relieve rather than unnecessarily to encumber its docket; and attorneys might well trust their own judgment as to the proper method of bringing a case to this court, if they thought it entitled to come.

We will not forget to observe, in this brief, the duty which we have above suggested that all members of its bar owe this

court with respect to useless trespass upon its time, and, pretermitting all other questions, we will confine ourselves to a discussion of what the brief in favor of the petition for certiorari describes as "the great issue" of the present case.

The petitioner for certiorari contends, and in order that there may be no mistake about the contention we will repeat it in the exact words of his brief, that:

> "The courts have no right to revise and review the determination of the President and Senate with relation to a question of fact which it was their duty under the law to determine."

There are two sufficient answers to the foregoing proposition. The first is that it does not correctly state the law as applicable to this case; and the second is that it is not involved in this case.

We do not hesitate to say that the law can prescribe the qualifications for any office outside of those offices the qualifications for which are fixed in the Constitution; nor do we hesitate to say that the law, having fixed the qualifications, can forbid the President, with the advice and consent of the Senate, or the President alone, or the heads of Departments, or the courts of law, to appoint any person not possessing those qualifications. If Congress possesses the power to prescribe the qualifications for any given office, then undoubtedly every officer authorized to make an appointment to that office must make it within the qualifications prescribed, or else we are brought to the startling proposition that the officers of the law in this country are not obliged to obey the law. That proposition seems to us too dangerous to find acceptance anywhere, and too plainly erroneous to require discussion here.

Executive Judgment and Discretion.

The cases which hold that the courts cannot control the judgment or the discretion of executive officers are wholly without relevancy here. We have not asked any court to control the judgment or discretion of the President. We have not asked that he be mandamused to appoint any other person, or enjoined from appointing Newman. The President is not a party to this case, and presumably is not interested in it, further than his oath requires him to see that the laws are faithfully executed.

But if this were a proceeding to prevent the President from appointing Mr. Newman to the office of a civil Commissioner of the District of Columbia, it would not, even then, be a proceeding to control the judgment or discretion of the President, because the statute creating that office withdrew the appointment of certain persons from the judgment and discretion of the President. Under that statute the President cannot, in the exercise of any judgment or discretion conferred on him, appoint any person who is not a citizen of the United States or who had not been an actual resident of the District of Columbia for three years next before his appointment, or who had, during that period, claimed residence elsewhere. All persons not possessing those qualifications were absolutely withdrawn from the President's discretion and judgment, but all who possess those qualifications, no matter what their age, their race, their sex, their infirmities, or their politics might be, are eligible to presidential favor.

The Real Issue.

But if it were conceded that the law could not restrain the President from appointing ineligible persons to office, that concession would not control the court, because this case does not present that question. The issue here is not the power of the President to appoint, but the right of the appointee to hold. When Congress prescribes the qualifications for an office it does not generally provide that the appointing power

shall not appoint any person except one possessing the prescribed qualifications, but usually draws the law so as to disable the appointee from holding the office. Even legislators who know that Congress can limit the power of appointment to persons possessing certain qualifications have thought that it comports better with the amenities which ought to exist between the two branches of the Government to impose the disability upon the appointee rather than upon the appointing power, and an examination of the statute which prescribes the qualifications of those who may be appointed to the office which Mr. Newman holds will readily disclose the fact that it is drawn in that way.

That law does not say that the President shall not appoint any person except one qualified in accordance with it, but says:

> "The two persons appointed from civil life shall, at the time of their appointment, be citizens of the United States, and shall have been actual residents of the District of Columbia for three years next before their appointment, and have during that period claimed residence nowhere else."

Plainly this prescribes the qualifications of the appointee. It was so treated from the beginning to the end of this case. The relator, in his original petition, did not allege that the President could not appoint Newman to the office of a civil Commissioner of the District of Columbia, but distinctly alleged that Newman could not hold that office, because he did not meet the qualifications prescribed by the law. The President's power was not challenged, nor was he made a party to the action, but the whole case proceeded upon the naked and simple question as to whether Newman had been an actual resident of the District of Columbia for three years next preceding his appointment and had not claimed residence elsewhere.

The power of the President to appoint a given person to a

certain office might be one thing, and the right of the person so appointed to hold that office might be a very different thing. This difference is often illustrated by testamentary dispositions of property. Under the law of many States the right of the testator, dying without heirs, to dispose of his property is almost unlimited, and yet the law in some of those States provides that a bequest to certain corporations is void. In those cases the testator's right to make the bequest was not directly limited, but the beneficiary was incapable, under the law, of receiving it.

II.

The brief in support of the petition for certiorari complains that "presidential and senatorial action" were treated "as without even evidential value" by the courts below. The record does not sustain that complaint. We recognized from the beginning that his nomination by the President and his confirmation by the Senate established Newman's *prima facie* right to the office which he held, and we conceded that it was incumbent upon us to repel, by satisfactory evidence, the presumption thus created in his favor. That, indeed, was not the original rule in a *quo warranto* proceeding, for, anciently, whenever that writ was issued against the incumbent of an office he was required to establish his title, and the burden of doing so rested on him; but the proceeding has been so altered and so liberalized that the old rule no longer prevails. We instituted and we tried this case upon the theory that we were required to overcome Newman's *prima facie* right, arising out of the President's nomination when confirmed by the Senate, and we assumed the burden of proving that he was not eligible under the statute.

We are familiar with the line of decisions which declare the very sensible doctrine that where the law imposes upon any officer a duty it is presumed that the duty thus imposed was properly performed. That presumption, however, is a

prima facie, and not a conclusive, one. To treat it as conclusive would leave our public officers to disregard our law at their own will, and their acts, though plainly contrary to the statute, would be binding upon all citizens. Surely a case must be a desperate one when its advocates are driven to advance and defend such a doctrine.

We freely admit that the courts of this country are justified in assuming, with no evidence before them to the contrary, that every executive officer has performed his duty according to the law, but we utterly reject the doctrine which denies a citizen the right to allege and prove that public officers have not acted in conformity with the law. The respondent, in *quo warranto,* was fairly entitled to the presumption that he was qualified to hold the office to which the President had nominated and the Senate had confirmed him, but neither a presidential nomination nor a senatorial confirmation can supersede the requirements of the law, nor deny the courts the right to determine, in a proper proceeding, whether or not an appointee is eligible to the office which he holds.

In the Court of Appeals.

The brief supporting the petition for certiorari repeats in more than one place that "a majority of the Court of Appeals" erred in not treating the President's nomination and the Senate's confirmation as conclusive. It may not be important enough to justify us in doing so, but we feel compelled, in fairness to the Chief Justice of the Court of Appeals, to say that while he dissented both on the first hearing and the second hearing of this case in that court, he did not, in either case, say anything that could sanction the novel and dangerous doctrine now urged by the attorneys in support of this petition for a writ of certiorari. On the contrary he concluded his dissenting opinion upon the first hearing in these words:

> "I base my dissent upon the sole ground that the relator is not an interested person within the meaning of the statute, and is not, therefore, entitled to maintain this action without the approval of the Attorney-General or the District Attorney with whom the interests of the public are entrusted."

That was the bearing in which the attorneys for Mr. Newman insisted so strenuously that the courts cannot go behind a presidential nomination and a senatorial confirmation to determine the eligibility of an office-holder, and the fact that the dissenting Chief Justice declares that he bases his dissent "upon the sole ground" that the action could not be maintained by the relator is equivalent to a concurrence with his brothers upon all the other grounds. It does not, therefore, seem to us that the attorneys for Mr. Newman have any right to intimate that there was any division in the Court of Appeals of the District of Columbia on "the great issue," as they call it, presented in this case.

A New Question.

The main ground upon which this court is urged to grant a writ of certiorari in this case is that it presents for the first time the question whether or not the courts can inquire into the eligibility of an office-holder who has been nominated by the President and confirmed by the Senate. This court has not, it is true, in more than a century of existence been called upon to decide that question, but to our way of thinking that is a circumstance strongly tending to prove that the question presents no substantial controversy, and, therefore, this court ought not to occupy its time in considering it. The fact that a question has not been decided is by no means a sufficient reason for calling upon this court to decide it, for some propositions are so plain that no lawyer has ever controverted them. Without further argument on that point, we will answer the suggestion that the writ of certiorari ought to

be granted because the question involved in this case has never before been presented to this court with the quotation from Mississippi *vs.* Johnson, 4 Wall., 475, which quotation our learned opponents have incorporated in their brief touching another point, seemingly oblivious to the fact that it is a complete answer to the very basic ground of their application. That quotation is:

> "It was admitted on the argument that the application now made to us is without precedent; and this is of much weight against it. * * * The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained."

And leave to file the bill in that case was denied just as we respectfully submit the petition for a writ of certiorari ought to be denied in this case.

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